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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 653

LAVERE REDFIELD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner, Lavere Redfield, respectfully prays for a Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit, in order to review the judgment affirming the order of the United States District Court for the District of Nevada, denying a motion for a new trial after conviction of the petitioner on six counts of an eight-count indictment charging evasion of income taxes, and sentencing peti-

tioner to five years in prison and a $10,000.00 fine on each count, plus costs of suit ($16,060.52). The prison sentence on each count was ordered to run concurrently.

OPINIONS

The opinion of the Trial Court denying the petitioner's motion for a new trial is reported at 197 F. Supp. 559 (March 23, 1961) and may be found in the Appendices to this petition marked "Appendix A". The opinion of the Circuit Court adopting the opinion of the trial Court and affirming the judgment is reported at ..... Fed. ..... (October 16, 1961). A copy of said opinion is included in the Appendices to this petition and marked "Appendix B". (Tr. Vol. II, pages 240-241.)

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1961. A copy of said judgment is included in the Appendices to this petition and marked "Appendix C". A petition for rehearing was timely filed in the Court of Appeals, and it was denied on November 13, 1961. (Tr. Vol. II, page 243.) On November 30, 1961, an order issued from this Court extending time to file this Petition for Writ of Certiorari to and including January 12, 1962.

The jurisdiction of the United States Court of Appeals was invoked under 28 U.S.C., Secs. 1291 and 1294.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Was petitioner compelled by the Trial Court and the prosecution to be a witness against himself in violation of his constitutional privileges against self-incrimination and denial of due process of law?

II. Was petitioner, under the circumstances presented herein, denied Assistance of Counsel?

III. Was petitioner denied a fair and impartial trial and thus, Due Process of Law?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution provide in part as follows:

Fifth Amendment:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . ."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of Counsel for his Defense."

STATUTORY PROVISIONS

Title 18 of Federal Rules of Criminal Procedure, Rule 44 states as follows:

> "If the defendant appears in Court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at

every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel."

STATEMENT OF THE CASE

On May 26, 1960, the petitioner was indicted by a Federal Grand Jury on an eight-count indictment charging him with income tax evasion under Section 145(b) Internal Revenue Code of 1939; 26 United States Code, 1939 Edition, Section 145(b), and Section 7201, Internal Revenue Code of 1954; 26 United States Code 1954 Edition, Section 7201. (Tr. Vol. IV, pages 2-7.) The jurisdiction of the United States District Court, for the District of Nevada was invoked under the foregoing sections.

Petitioner appeared without counsel at the arraignment and entered a plea of not guilty to each of the separate counts of the indictment. (Tr. Vol. IV, page 10.) Thereafter, Petitioner appeared at every stage of the proceeding including trial and judgment in propria persona as counsel pro se. (Professional counsel was retained after judgment and appeared for Petitioner in his motion for a new trial and thereafter, to the present proceedings.)

A trial by a petit jury resulted in a verdict of guilty as charged on Counts I, II, III, V, VI and VII and not guilty on Counts IV and VIII. The jury trial consumed a period of four weeks and the verdict was returned on October 28, 1960. The guilty verdicts related to the tax years 1953, 1954 and 1955, and the not guilty verdicts related to the tax year 1956. (Vol. I, page 28.)

Although the defense presented sixteen witnesses, *the defendant-petitioner did not take the stand.* (Tr. Vol. III, pages 6-7.)

The objurgations of the Trial Court directed towards this defendant during the course of the trial are discussed and resolved by the Trial Court in its opinion. (Appendix A.)

The testimony of various Internal Revenue Service agents with respect to the petitioner-defendant's refusal to cooperate or answer their questions is set forth in the Appendices to this Petition and labeled "Appendix D".

The argument of the prosecution commenting on the testimony of the Internal Revenue Service agents and the activities of the defendant with regard thereto is set forth in its pertinent parts in "Appendix E" of the Appendices to this Petition.

The following quotations are remarks of the Trial Court made during the course of trial directed towards the defendant-petitioner *not* discussed in the opinions of either the Trial Court or the Court of Appeals. (Appendices A and B.) Additionally, as set forth herein in full, is the cross-examination by the Trial Court of the defendant-petitioner, the defendant not having taken the stand at that, or any other time. All volume, page and line references are to the certified transcript of record on file with this Court:

Remarks of the Trial Court
Directed to the Defendant

Vol. VI, page 790, line 19: "When you want to testify, you take the witness stand."

Vol. VI, page 793, line 10: "If you wish to bring that out, you testify to that."

Vol. VII, page 929, line 2: "You testify when you take the witness chair."

Vol. VII, page 988, line 18: "Well, you can get on the stand and testify to the contrary."

Vol. VIII, page 1269, line 23: "Now, don't testify. If you do, be sworn."

Vol. VIII, page 1377, line 9: "Leave your narration until you take the witness chair."

Vol. VIII, page 1390, line 26: "You can testify to its non-fulfillment when you take the witness stand . . ."

Vol. IX, page 1559, line 17: "You can take the witness chair and testify as to what it was to the contrary."

Vol. IX, page 1563, line 15: "You should testify under oath."

Vol. IX, page 1564, line 20: "You can take the stand and put your witnesses on to do that."

Vol. IX, page 1566, line 3: "Now, Mr. Redfield, I will excuse the witness and you can testify, if you wish."

Vol. IX, page 1566, line 23: "Well, I still think that you should be sworn."

Vol. IX, page 1567, line 1: "Just a second, I think you should be sworn if you are going to so state."

Vol. IX, page 1571, line 5: "Now, let the witness testify. You are going to have all the time you want. I am going to give you a week on that witness chair if you want to take it . . ."

Vol. X, page 1685, line 3: "Now, at this time, do you wish to take the stand? . . ."

Vol. X, page 1685, line 17: "Why don't you clear up a lot of these things by taking the witness chair? . . ."

Vol. X, page 1744, line 15: "We would get a lot further if you would take the stand now, Mr. Redfield."

Cross Examination of the Defendant-Petitioner by the Trial Court

Vol. VII, page 870, line 8, et seq.:

"The Court. Now, just a second counsel [the defendant-petitioner]. I want to ask you a question there. To what specific time and moment do you relate this statement you are making about being a philanthropist?

Mr. Redfield. May of 1953 when I first paid off the note for the brewing company.

The Court. In '53?

Mr. Redfield. Yes.

The Court. At that time you agreed that there would be no interest?

Mr. Redfield. Yes, sir.

By Mr. Redfield:

Q. That is true, is it not?

A. Yes, it is.

The Court. That was the time you took the trust deed on all the corporate property?

Mr. Redfield. Took an assignment from the bank, your Honor.

The Court. And you took another assignment of the trust deed security?

Mr. Redfield. And the notes.

The Witness. The interest shown on the notes, but he told us we wouldn't have to worry about the interest for the year, just to try to get the principal paid off, if possible.

By Mr. Redfield:

Q. At the time I paid the notes to the bank, necessarily I had to pay the bank their principal and interest, but there would be no interest coming to me after having paid off those notes; is that true.

A. That is right.

The Court. Now, getting back to the second question of your advancing funds, at which time you took a deed to the real property and a bill of sale to the personal property, I assume that you mean the property of the corporation?

Mr. Redfield. Yes, your Honor.

The Court. So at all times the transactions were actually between you, as an individual, and the Reno Brewing Company as a corporation?

Mr. Redfield. That is so.

The Court. That is all I wanted to know. I wanted to be clear on that point."

No specific instructions were given to the jury at the conclusion of any of the above quoted remarks nor was any explanation or instructions given with

respect to the above quoted cross-examination when it was completed.

After serving approximately six months of the jail sentence imposed, petitioner was released on bail. Execution of the jail sentence has been stayed pending the outcome of this Petition.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION

I

PETITIONER WAS COMPELLED TO BE A WITNESS AGAINST HIMSELF IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND RIGHTS TO DUE PROCESS OF LAW.

The Statement of the Case, supra, is replete with quotations from the trial transcript indicating that:

A. The Trial Court constantly told, asked and suggested that the petitioner take the witness stand;

B. The Trial Court stated that the petitioner had a right to take the witness stand;

C. The Trial Court cross examined the petitioner while the petitioner was cross examining a government witness.

D. Appendices "C" and "D" show that the prosecution introduced evidence to the effect that petitioner failed to answer pre-trial questions of, and otherwise cooperate with, government investigators, and did then proceed to comment to the jury during closing argument on the petitioner's said failure.

A fact which should be of particular interest to this Court is that relatively little case law exists with respect to the particular prohibited conduct engaged in by the Trial Court and the prosecution. However, the small body of case law specifically in point entirely and unequivocally supports the proposition that petitioner's privilege against self-incrimination has been violated.

The philosophy of the Courts in strictly upholding the *privilege against self-incrimination* is stated in the oft-cited case of *McKnight v. United States* (6th Cir. 1902) 115 Fed. 972, 981, by Justice Day when he was sitting as a Circuit Judge,

> "A perusal of the decisions of the Supreme Court shows that no constitutional right has been the subject of more jealous care than that which protects one accused of crime from being compelled to give testimony against himself."

In line with this extreme solicitude exercised by the Courts in protecting this most basic and essential right, it matters not that a violation of the right be slight or aggravated (as in in the instant case). As was stated by Justice Bradley in the landmark decision of *Boyd v. United States*, 116 U.S. 616, 26 L. Ed. 746,

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of

person and property should be liberally construed. A close and liberal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

A. It is a violation of the privilege to tell a defendant to take the witness stand, or even suggest that he take the witness stand, in the presence of the jury.

In the Statement of the Case, supra, petitioner has cited seventeen (17) instances wherein the Trial Court either directed the petitioner-defendant to take the witness stand or suggested that he be sworn.

In *United States v. Hamilton* (D.C.S.D. W.Va., 1951), 97 F. Supp. 123, wherein the Trial Judge, in open Court, asked the defendant who was represented by counsel to admit or deny that his handwriting appeared on certain documents, the same Trial Judge, in granting defendant's Motion to Vacate Sentence And Conviction, stated at page 127:

> "Objective consideration of the Court's statement in the presence of the jury leaves no room for doubt that it was a breach of the privilege given to Hamilton [the defendant] by the Fifth Amendment to the Constitution of the United States. . . . The leading case of *McKnight v. United States*, 6th Cir., 115 F. 972 makes it clear that *actual compulsion is not essential, but that the right is violated by any official suggestion that a defendant take the stand or make admissions.* See

Boyd v. United States, 116 U.S. 616, 29 L. Ed. 746."[1] (Emphasis added.)

In *United States v. Lawn* (D.C.S.D. N.Y., 1953), 115 F. Supp. 674, the law was stated by Judge Goddard to be as follows:

> "It is thus improper to call him [the defendant in a criminal case] without a request on his part. 8 Wigmore on Evidence, 3rd Edit., p. 393; 3 Wharton's Criminal Evidence, 11th Edit. p. 1960."[2]

In the leading cases of *Boyd v. United States, supra,*[3] and *McKnight v. United States, supra,* the respective trial Courts therein called upon the defendants to produce documentary evidence. This is exactly

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[1]Though the Court found that its statement constituted error, it held that the error was not prejudicial, in that the jury, both at the time the statement was made and later in the Court's instructions, were told not to draw any unfavorable inferences from the defendant's failure to comply with the Court's request. The actual ground for the granting of the motion was the prosecuting attorney's error in commenting on the defendant's failure to testify.

[2]In *Lawn*, the defendant after an indictment had been filed against him, was subpoenaed by the Grand Jury to testify against himself. After testifying, a new indictment was filed against him and the defendant moved Judge Goddard to quash the indictment on the ground that his privilege against self-incrimination had been violated. Judge Goddard held that once an information is filed, the individual achieves the status of an "accused" and cannot be called to testify unless he requests to testify.

[3]In *Boyd*, the Court had under consideration a section of the customs revenue laws of the United States authorizing a Court of the United States to require the production of books, invoices and papers in Court, or else the allegations of the prosecuting attorney regarding the contents of said documents are to be taken as confessed; it was held that this portion of the act was unconstitutional as applied to suits for penalties and forfeitures of the parties' goods as being repugnant to the Fourth and Fifth Amendments.

the same as telling such a defendant to take the witness stand and produce testimonial evidence. In each of these cases, such conduct on the part of the Trial Court was held to be clearly violative of the defendants' privilege against self-incrimination.

In the *McKnight* case, the Court stated,

> "In the present case, the accused, in the presence of the jury, was, by direction of the court, called upon to produce the document. . . . The production of such a paper would have been self-incriminating to the defendant in the highest degree. It is true, the learned judge made no order requiring its production; but the accused, by the demand made upon him before the jury, after proof tending to show his possession of the document, was required either to produce it, deny or explain his possession of the writing, or by his very silence permit inferences to be drawn against him quite as prejudicial as positive testimony would be. Nor were the jury advised that the nonproduction of the writing afforded no ground for an inference of guilt. We think this procedure was an infraction of the constitutional rights of the accused, within the meaning of the fifth amendment to the constitution."

United States v. Housing Foundation (3rd Cir., 1949), 176 F. 2d 665, involved the criminal trial of two defendants for using the mails to defraud. At the beginning of the defendants' case, counsel for one of the defendants called to the stand the other defendant, Mr. Westfield, and made him testify over the objection of his counsel. The judgment of conviction of defendant Westfield who had been forced to testify

was reversed notwithstanding that the trial judge had said testimony stricken from the record and cautioned the jury not to consider the same and not to draw any presumptions from said defendants' failure to testify. Judge Goodrich, speaking for the 3rd Circuit, stated at page 665,

> "That there was ample evidence to sustain the conviction there is not the slightest doubt."

However, Judge Goodrich, on page 666, went on to state as follows:

> "Compelling the defendant Westfield to take the stand and to testify in a criminal prosecution against himself is so fundamental an error that the judgment must be reversed and a new trial ordered as to Westfield. [Citing: *Boyd v. United States, supra, Councelman v. Hitchcock,* 142 U.S. 547, 562, 35 L. Ed. 1110, and *United States v. Sprengle,* 3rd Cir. 1939, 103 F. 2nd 876, 883]. The error made arises from confusing the privilege of any witness not to give incriminating answers with the right of the accused not to take the stand in a criminal prosecution against himself. Both come within the protection of the 5th Amendment. . . . The plain difference between the privilege of witness and accused is that the latter may not be required to take the stand at all. We need only say in this case that the accused was required to take the stand and to testify over his objection and in violation of his right protected both by the Constitution and the common law."

B. It is even a violation of the privilege to state in the presence of the jury that the defendant in a criminal case has the right to take the witness stand.

Of the seventeen examples set out in the Statement of the Case, supra, seven of those remarks were violative of this particular aspect of the Privilege (unnumbered examples 2, 4, 7, 8, 10, 11, 14).

The *McKnight case, supra,* involved the additional error of the Trial Court stating to the defendant's attorney, in the presence of the jury, that the defendant had a right to take the witness stand.[4]

The Court of Appeals for the Sixth Circuit held at page 982 that,

> "The reference to the right of the defendant to testify where he does not see fit to avail himself of the privilege [to testify] puts him in a position where the jury will draw inferences against him from his silence, and the statute [18 U.S.C.A. 3481] which was intended as a shield for protection will be turned into a weapon of attack in establishing guilt."

The Court went on to state,

> "Nor does it make any difference that the defendant afterward testified. As has been said in

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[4] "The Court. That is a question of proof, entirely. Counsel cannot testify for the defendant.

Col. Breckinridge. No one can make answer for the defendant but the defendant himself.

The Court. He can testify in rebuttal to this proposition.

Col. Breckinridge. He can do more than that, and we object to the statement as to his right to testify.

The Court. I did not mean he could testify in person, but he can introduce testimony in rebuttal of the proposition."

Thereupon, the jury was told by the Court to disregard the Court's statement.

> some authorities, after allusion has once been made to the right of the defendant to testify, the accused is virtually driven upon the stand, or remains off at the peril of having inferences drawn against him for his silence, when the law gives him a right not to speak."

As indicated in the foregoing quotation, it is irrelevant that a defendant take the witness stand once the error has been committed. It follows, therefore, that a violation of the constitutional privilege against self-incrimination becomes even more pronounced and flagrant, as in the instant case, where the defendant appearing pro se did not take the stand in his defense.

C. It is a violation of the privilege for the trial Court to question a criminal defendant appearing pro se since this compels the defendant to become a witness against himself.

Petitioner, after a diligent search, has been able to locate only one case discussing this exact point. Although it is a state Court case decided by the Supreme Judicial Court of Massachusetts, the similarity of facts and the application of law to the instant case is uncanny. (The defendant there appeared pro se and was questioned by the Trial Court while the defendant was cross examining witnesses.) In that case of *Brown v. Commonwealth*, 335 Mass. 476, 483, 140 N.E. 2d 461, 465 (1957). Chief Justice Wilkins delivered an extremely well-reasoned and considered opinion and held in part:

> "Likewise, we think that the questions asked by the Judge of the petitioner while he was cross examining a witness in effect made him a witness,

or forced him to make admissions, and, however viewed, were violative of the privilege against self-incrimination."

D. It is a violation of the privilege against self-incrimination for the prosecution in a criminal case to introduce evidence concerning a defendant's failure to answer government investigators' pre-trial questions or evidence of a defendant's failure to cooperate, and then comment on such a failure.

In Appendix "D" to this Petition, petitioner has set forth excerpts of testimony of three government investigators wherein the prosecution solicited testimony that the petitioner-defendant had prior to trial either refused to answer the questions of these investigators or had in other ways refused to cooperate with them. Appendix "E" sets forth the comments of the prosecution on this testimony.

In *United States v. Sprengel* (3rd Cir. 1939), 103 F. 2d 876, 883, defendant was charged with conspiracy to defraud through the mails. A postal inspector testified for the prosecution that questionnaires had been sent to the defendant and had not been answered. The prosecution then proceeded to comment to the jury on the defendant's failure to answer the questionnaires.

The Court in reversing the judgment of conviction stated.

> "We think that this matter also constituted prejudicial error to the appellants. The law is well settled that a defendant cannot be compelled to testify against himself and that a prosecuting attorney may not comment upon his failure to so testify. The question presented by this aspect of

> the case at bar is closely analogous. The appellants were not compelled by law to respond to the questionnaires of the Post Office Department and the fact that they did not do so does not present evidence that they acted in bad faith or were not acting in good faith. *Boyd v. United States,* 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746; *McKnight v. United States,* 6 Cir., 115 F. 972."

This same result, based on the same reasoning, was reached by the Court in *Hilton v. United States* (5th Cir. 1955), 221 F. 2d 338, a narcotics case, wherein, over the objection of defense counsel, the prosecution was permitted to introduce testimony that the defendant had been given an opportunity to explain the presence of narcotics on his premises, and had refused to do so.

In summation, petitioner can only point out that each of the four instances cited above, if taken separately, would have been sufficient to secure a reversal of the conviction. A combination of all four produces error of such magnitude that it is almost incredible that the violation of the Privilege against Self-Incrimination and the resultant denial of Due Process of Law were not passed upon nor commented on either by the Trial Court in its opinion (Appendix "A") denying petitioner's Motion for New Trial or in the opinion of the Court of Appeals (Appendix "B") which "adopted" the Trial Court's opinion in its entirety.

II

THE PETITIONER WAS DENIED ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW IN VIOLATION OF THE SIXTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION THROUGH THE TRIAL COURT'S FAILURE TO EXERCISE ITS DUTY TO INQUIRE INTO, AND ADVISE ON, PETITIONER'S WAIVER OF COUNSEL.

The subject matter discussed under this broad heading concerns itself with two novel points never before directly dealt with in any case so far as can be ascertained. The conclusions reached and the contentions propounded are arrived at through a series of inductive inferences. By its very nature, the exponation must either be extremely brief, leaving the connotations to the reader's experience, or cumbersome to the point of boredom. An attempt will be made to be brief.

The ingredients of the present potage are worthy of note:

1. A complicated (90 witnesses and 469 documents) for the government criminal prosecution.

2. An unusual but seemingly "intelligent waiver" of counsel by a wealthy defendant.

3. Inexperience and ineptness of a defendant appearing pro se in the conduct of a criminal defense becoming apparent in the early stages of the trial.

4. An explanation, after conviction, for the defendant's unusual waiver of counsel.

5. An assessment against the defendant for "costs of prosecution" in the sum of $16,060.52.

The blending of these factors produced the following results:

1. Constant chidings and scoldings of, and an attitude of impatience and annoyance with the defendant by the Trial Court, in the presence of the jury.

2. An inept and inadequate defense.

3. Inadvertent but egregious error by a highly learned and competent Trial Court (see discussion, supra, re self-incrimination).

4. Inadvertent but egregious error on the part of able government attorneys in the presentation of their case and in their closing argument. (See "self-incrimination," supra).

It is petitioner's contention that under the peculiar facts and circumstances of the instant case, the Trial Court, at the time of arraignment, had the affirmative duty of inquiring into the reason for the unusual waiver of counsel and had the further affirmative duty to advise the petitioner-defendant that it was imperative that he have counsel for his defense; *that if the defendant was concerned with the cost of the defense that the court would appoint an attorney to represent the defendant, and that if the defendant lost the case, the costs of the prosecution and the appointed counsel would be taxed against him, and if the defendant were acquitted, there would be no cost.*

Secondly, it is petitioner's contention that assuming arguendo, that the Trial Court did not have the affirmative duty to so advise the petitioner-defendant at the time of arraignment, that it did have that duty during the initial stages of the trial proceedings when the necessity for effective counsel for the defendant-

petitioner became so overwhelmingly apparent that the Trial Court was put on notice that the previous waiver of counsel had not been "intelligent".

It is respectfully suggested that the above two contentions are both supported inferentially by constitutional and case law, and that in fact, in the instant case, the Trial Court's jurisdiction was lost either at the arraignment or early in the trial.

The italicized portion of petitioner's first contention is admittedly a strong statement regarding the duty of the Trial Court in the instant case. But since ". . . the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused . . ." the defendant's circumstances and the fact that costs of prosecution are taxable and were taxed against the defendant-petitioner must be considered.

There is no question, as was pointed out by the Trial Court in its opinion (Appendix A), that the Court explained the complicated nature of the proceedings to the defendant; ascertained that the defendant was able to employ counsel; and *offered to appoint counsel,* all of which was rejected by the defendant-petitioner. However, as the Court there pointed out it was not necessary to appoint counsel, "Since defendant was able to retain counsel. . . . See Rule 44, Federal Rules of Criminal Procedure ('If the defendant appears in court without counsel, the court shall advise him of his right to counsel and

assign counsel to represent him at every stage of the proceeding *unless he elects to proceed without counsel or is able to obtain counsel.'*) . . ." The emphasis was supplied by the court.

It is respectfully suggested that the dictum of the Trial Court, and in fact Rule 44 on which the court relied, results in a total emasculation of the mandate of the Sixth Amendment and the due proces provisions implicit therein. Constitutional guarantees have always extended equally to the rich and the poor.[5]

As was pointed out earlier, each case must rest on its own particular facts and circumstances, and one of the circumstances of the instant case was that the defendant-petitioner was actually taxed costs of $16,060.52 by the Trial Court.

Section 7201 of the Internal Revenue Code of 1954 under which defendant was indicted and convicted provides for the criminal penalty and *"costs of prosecution"* to be assessed against the defendant. So does Title 28, Section 1918(b): "Whenever any conviction for any offense not capital is obtained in a District

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[5]The notes of the advisory committee on Rules to Rule 44 state: "This rule is a restatement of existing law in regard to the defendant's constitutional right of counsel as defined in recent judicial decisions . . . .

"18 U.S.C.A. Sec. 3005, formerly Sec. 563, which was derived from the act of April 30, 1790 (1 Stat. 118), provided:

"'Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire and they shall have free access to him at all seasonable hours.'"

Court, the Court may order defendant to pay the costs of prosecution."

The Trial Court determined that the defendant was financially able to employ counsel. It also inquired as to whether the defendant desired to retain counsel. On the other hand, it neglected to inquire as to the reason for defendant's refusal to employ counsel and further neglected to inform defendant that in the event he was found guilty, he would have to pay the costs of prosecution, and that counsel could be appointed for him on the basis that he would pay for said counsel if convicted and pay nothing if acquitted.

If the Court had the duty [See discussion, infra] to inquire into defendant's reason for waiver, and the defendant's reason was then expressed as it was explained after conviction, than petitioner contends that it would have been the affirmative duty of the Court where the defendant was a wealthy man to persuade the defendant to secure Court-appointed counsel with the clear understanding that the costs of that counsel would be assessed against him if he were convicted. This would be consistent with the defendant's expression of innocence and his reluctance to incur the expense of proving it. It is further consistent with the case of *Knox County Counsel v. State ex rel. McCormick*[6] wherein the Court held that it is a violation of the Constitution to require attorneys to prosecute and defend criminal cases without

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[6]*Knox County Counsel v. State ex rel. McCormick*, 1940, 29 N.E. 2d 405, 27 Ind. 493, 130 A.L.R. 1437.

fees. The latter case cites with approval *Johnson v. Zerbst*,[7] and *Powell, et al., v. State*.[8]

* * *

The Sixth Amendment to the United States Constitution is an essential jurisdictional prerequisite to a Federal Court's authority to deprive an accused of life or liberty. If the accused is not represented by counsel and has not competently and intelligently waived his constitutional right, there is a jurisdictional bar to a valid conviction. The Trial Court's jurisdiction at the beginning of the trial may be lost in the course of the proceedings due to the failure of the Court to obtain counsel for one who has not intelligently waived this constitutional guaranty.[9]

The constitutional right of an accused to be represented by counsel "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. Whether there is a proper waiver should be clearly determined by the Trial Court, and it would be fitting and appropriate for that determination to appear upon the record."[10]

Defendant-petitioner, on motion for new trial, pointed out through the affidavits of Drs. Brown and Toller, psychiatrists, (Tr. Vol. 1, pages 62, 68), that

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[7]*Johnson v. Zerbst, Warden* (1938), 304 U.S. 458, 82 L. Ed. 1461.

[8]*Powell et al. v. State* (1932), 287 U.S. 45, 77 L. Ed. 158, 84 A.L.R. 527.

[9]*Johnson v. Zerbst, Warden, supra.*

[10]*Johnson v. Zerbst, Warden, supra.*

in essence defendant-petitioner was obsessed with money; that he had a compulsion to make money; and that money assumed more than natural proportions to him. "In short, both men seem to agree that somehow or other the decision to waive counsel was motivated by an inner desire to save money." (Opinion, Appendix A.)

In the same opinion, the Trial Court discusses the defendant's explanation for the waiver of counsel. The defendant said he thought he was innocent and the jury would acquit, and that employing counsel would therefore be an expensive and idle act. The explanation was rejected by the Trial Court on the ad hoc basis that (1) the defendant knew what he was charged with and (2) was found guilty by a jury of "wilfully" evading taxes and therefore defendant was "not a man who [could] honestly say that he [knew he was] innocent."

The Court's theory (note 3, Appendix A) was that the defendant was so wily and experienced an advocate in the field of law, and knew so much more than he could have been willing or able to divulge to his attorney, that he took a chance on befuddling at least one juror so that the jury would be "hung". "We have grave doubts that most lawyers could gain sufficient familiarity with what had transpired so as to be able to effectively combat the government's case," said the Trial Court.

Possibly, the Court's duty of inquiry in the instant case arose either at the arraignment or at one or more of the proceedings *prior* to the trial itself. As admit-

ted by the Trial Court in its opinion (Appendix A), the instant case was complicated. Further, the defendant was a wealthy man undoubtedly in a financial position to obtain counsel who boldly stated to the Court that he would represent himself. The situation presented to the Court was so highly unusual as to recommend itself to the Court that a further inquiry into the situation would be needed. "The Sixth Amendment . . . embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious. . . . Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. . . ."[11]

Assuming arguendo, that the foregoing contention of petitioner with respect to the pre-trial duty of the judge was not clearly present in the instant case due to the possible absence of indication that the defendant was not competent to represent himself—("when he [the defendant-petitioner] stated, 'I feel I am competent to defend myself.' . . . he did so with that

[11] *Johnson v. Zerbst, Warden, supra.*

convincingness that comes from the totally rational man who speaks with a soft voice. At all times relevant to the matter now under inquiry, he was alert, courteous and determined," said the Trial Court in its Opinion, Appendix A)--then certainly, the subsequent conduct of the defendant after the commencement of the trial was totally inconsonant with what the Trial Court had been led to believe and was of such a nature that any reasonable person would have been alerted to the fact that something was wrong. The extensive footnotes in the Trial Court's Opinion indicate the problem confronting the Court.

From a reading of the Trial Court's Opinion, it is abundantly clear that somewhere in the early stages of the trial[12] the Court was faced with an anomalous,

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[12]Transcript Vol. VI, page 784, line 14:

"Mr. Redfield. Your Honor, I have never heard such a portrayal . . .

The Court. Now, Mr. Redfield, I will tolerate no comments from you concerning the behavior of anyone in this courtroom. That is the privilege of this Court. If you wish to cross examine this witness, be about your business.

Mr. Redfield. Well, your Honor, there is——

The Court. Don't address me. Cross examine the witness if you wish to exercise your right of cross examination . . ."

Page 790, line 21, et seq.

"Mr. Redfield. Well, it is difficult for me to see how to do this [With respect to cross examining the witness.]

The Court. Well, that difficulty should have been considered by you before you decided to represent yourself. It is no fault of the Court's and I don't want any intimation from you that anyone put you in this position. You are in this position voluntarily.

Mr. Redfield. Yes, but the facts are that they are just the opposite to what he has testified to . . ."

The above-quoted incident began at the cross examination of the witness Harold S. Chisholm. This witness, as it transpired, had been a losing defendant in a previous lawsuit where petitioner was a plaintiff. A reading of the transcript indicates that the event

if not incredible situation. An extremely wealthy defendant who had previously seemingly intelligently waived his right to counsel was conducting the defense of a serious and complicated criminal prosecution in a manner which euphemistically could be referred to as incompetent.

The Trial Court explains its tergiversation from the mandates of the Fifth and Sixth Amendments and the *Johnson case, supra,*[13] by citing the Ninth Circuit case of *Burstein v. The United States*[14] for the proposition that the defendant was not denied a fair trial merely because the "judge refrained from intermeddling". It is true that a Federal Trial Judge

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and subsequent fireworks started in the middle of the afternoon of October 11, 1960.

Trial had commenced on October 4, 1960, and up to that time approximately twenty-four hours of actual trial time had elapsed. During this time, the government had called sixty witnesses and introduced 366 exhibits in evidence for an amazing average of twenty-four minutes per witness and one exhibit every four minutes! The defendant had offered no objection to the exhibits and had not cross examined the witnesses called to introduce the exhibits except in one instance where a perfunctory (less than a page) cross examination was had.

In line with this and with the large costs of prosecution taxed against the petitioner, it might be noted that at Vol. V, page 312 et seq. (just prior to the introduction of Exhibit #93), petitioner offered to stipulate "that the plaintiff in this case can introduce any records, anything in the way of evidence that they have for the years under which I am indicted, and I have no objection to the introduction of anything whatsoever . . ." this offer was rejected by the Government. The Court commented at page 314 after petitioner's offer had been made that had the petitioner had counsel, this probably could have been taken care of before trial, but that the slow process of calling numerous witnesses from all over the United States was out of solicitude for the petitioner-defendant.

[13]304 U.S. 458, 82 L. Ed. 1461.

[14]*Burstein v. United States,* (9th Cir. 1949) 178 Fed. 2d 665, 670.

is not relegated to the position of a mere moderator,[15] and certainly his position should be less than a participant,[16] but we cannot agree that "intermeddling" equates to ignoring the obvious and/or denying an accused his Constitutional Guaranties.[17] "It may well be that solicitude for the essential rights of an accused require the Trial Judge to cross-examine government witnesses when an accused with no capacity to protect his rights insists upon conducting his own defense, or when an accused is represented by wholly inadequate counsel."[18]

Hindsight is always clearer than foresight. When defendant-petitioner retained counsel to present a good faith motion for new trial, the Trial Court was presented with an explanation as to the unusual waiver of counsel. The Court was then asked to view in retrospect the course of its own and the defendant's conduct during trial, and the doubt was resolved against the defendant.

The only logical conclusion that can be reached from a reading of the authorities cited herein is that the Trial Court had an affirmative duty to see that

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[15] *Quercia v. United States* (1933), 289 U.S. 466, 469, 289 L. Ed. 1321.

[16] *In the Matter of the United States of America* (1st Cir. 1961) 286 Fed. 2d 556.

[17] "Moreover, upon his [the Trial Court's] shoulders rests the duty to see that the trial is conducted with solicitude for the basic and essential rights of the accused."

In the Matter of the United States of America, supra. (1st Cir. 1961) 286 Fed. 2d 556.

Glasser v. United States, 315 U.S. 60, 71, 86 L. Ed. 680.

[18] *In the Matter of the United States of America, supra.*

defendant was given effective Assistance of Counsel, and this duty extended to the point of inquiring as to whether an intelligent waiver of counsel had been made—either prior to trial when unusual circumstances were presented to the Court—or during the course of trial when the defendant patently had "no capacity to protect his rights".

When a Court or an officer of the Court has knowledge requiring the exercise of a duty on the accused's behalf, its failure to exercise such a duty constitutes a denial of "due process of law."

Robinson v. Johnston, D. C. Cal. 1943, 50 F. Supp. 774;

Johnson v. Zerbst, supra, 304 U.S. 458, 82 L. Ed. 1461.

III

PETITIONER WAS DENIED A FAIR AND IMPARTIAL TRIAL AND THUS DUE PROCESS OF LAW.

It has been shown herein that the remarks and comments of the Trial Court with respect to the defendant's testifying have been a violation of his privilege against Self-Incrimination and Due Process of Law under the Fifth Amendment to the United States Constitution.

In combination with, and in addition to, the quoted remarks made by the Trial Court violating defendant-petitioner's privilege against Self-Incrimination, other remarks of the Court during the course of the

trial[19] made in the presence of the jury were of such a nature as to deny petitioner a fair and impartial trial and Due Process of Law.

Fair play is also an essence of "due process".

Galvan v. Press, 1954, 347 U.S. 522, 98 L. Ed. 911, Rehearing den. 348 U.S. 852, 999 L. Ed. 671.

In the case of *United States v. Ah Kee Eng* (2d Cir.) 241 Fed. 2d 157, 62 A.L.R. 2d 159, the Court found, among other things, reversible error in the conduct of the Trial Judge, namely the prejudicial nature of the Trial Judge's treatment of defense counsel and the defense throughout the trial. The Appellate Court found in the record that in numerous instances, the Trial Judge had "exhibited an attitude of impatience, and an annoyance at proper objections and interruptions as if they were captious, absurd or unnecessary", and "occasionally the Judge made gratuitous comments disparaging the defense counsel and the defense".

The opinion of Judge Lumbard in that case represents the opinion of petitioner herein: "While the Trial Judge should be permitted considerable latitude in dealing with counsel, ruling on objections, and

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[19]Some examples in the instant case of statements by the Court to the defendant-petitioner in the presence of the jury:

Tr. Vol. VI, page 799:

"I don't propose to have you impose on the jury by standing there hour after hour indicating how stupid you are . . ."

Tr. Vol. VIII, page 1384:

". . . Just because you want to be your own attorney, that doesn't mean that the bars of procedure are down and you can conduct this like you would a Piute Powwow."

keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus, repeated indications of impatience and displeasure of such nature to indicate that the Judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense. . . ."

CONCLUSION

For the reasons herein stated, petitioner respectfully urges that his Petition for Writ of Certiorari should be granted.

Dated, January 2, 1962.

Respectfully submitted,
GRUBIC, DRENDEL & BRADLEY,
BURTON MARKS,
By BURTON MARKS,
Attorneys for Petitioner.

(Appendices A, B, C, D and E are filed herewith in a separate volume)

Office Supreme Court U.S.
FILED
JAN 9 1962

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 653

LAVERE REDFIELD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

VOLUME II

APPENDICES TO
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Appendix A

DISTRICT COURT'S ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL, FILED MARCH 28, 1961

In the United States District Court
for the District of Nevada

Criminal No. 13,324

United States of America, Plaintiff,
vs.
Lavere Redfield, Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

I. Preliminary Matters.

On October 28, 1960, a jury found defendant to be guilty on six counts of an eight-count indictment charging wilful evasion of federal income taxes. On November 1, 1960, defendant, appearing *pro se,* filed a motion for new trial. On November 3, 1960, defendant, through his newly retained counsel, filed another motion for new trial, which motion, we take it, supersedes that filed on November 1, 1960. On November 10, 1960, at the request of defendant's counsel, this Court granted a continuance on the motion for new

trial, on the ground that a proper resolution of the motion could not be made until such time as a transcript of the trial record could be made available both to counsel and to this Court. On February 21, 1961 and on March 1, 1961, the parties filed their respective memoranda of points and authorities in support of or in opposition to the instant motion. Oral argument was had on March 3, 1961, followed by the government's filing, per stipulation approved by this Court, additional documentation, namely, reports of psychiatrists, to which we refer *infra*.

To begin with, we note that a motion for new trial is addressed to the discretion of this Court. *Naval v. United States*, 278 F.2d 611, 615 (9th Cir., 1960); *Straight v. United States*, 263 F.2d 811, 813 (9th Cir., 1959); *Adams v. United States*, 191 F.2d 206, 207 (9th Cir., 1951); *Eagleston v. United States*, 172 F.2d 194, 200 (9th Cir., 1949), cert. den. 336 U.S. 952 (1949). Furthermore, it is well settled that motions for new trials are not favored, *United States v. Costello*, 255 F.2d 876, 879 (2d Cir., 1958), cert. den. 357 U.S. 937, and that they should be granted only with great caution. *United States v. Costello, supra*, at 879; *United States v. Pruitt*, 121 F.Supp. 15, 17 (S.D. Tex., 1954), affirmed 217 F.2d 648 (5th Cir., 1954), cert. den. 349 U.S. 907 (1955). Finally, we would point out that harmless error, that is, any error which does not affect substantial rights, shall be disregarded. *Federal Rules of Criminal Procedure*, Rule 52(a). In other words, in order to prevail on this motion defendant must show that the errors at the trial, if

any, were prejudicial to him. *United States v. Evett,* 65 F.Supp. 151, 152 (N.D. Cal., 1946); *Union Electric Light & Power Co. v. Snyder Estate Co.,* 15 F.Supp. 379, 382 (W.D. Mo., 1936). And, the burden of demonstrating prejudicial error is on the defendant. *United States v. Segelman,* 86 F.Supp. 114, 117 (W.D. Pa., 1949); *c.f., United States ex rel. Darcy v. Handy,* 351 U.S. 454, 462 (1956) (habeas corpus proceeding, wherein the Supreme Court stated that the burden must be sustained " 'not as a matter of speculation, but as a demonstrable reality.' "); *c.f., Myres v. United States,* 174 F.2d 329, 332 (8th Cir., 1949) (appeal), cert. den. 338 U.S. 849 (1949); see also, *United States v. Smith,* 179 F.Supp. 684, 686-87 (D.D.C., 1959), which notes that a motion for new trial will be granted only "if the Court finds that there is a reasonable probability that there has been a miscarriage of justice . . . ."

Before we proceed to apply these principles to the instant motion, we note that several points of error are alleged in the motion filed on November 3, 1960, but which were not alluded to either in defendant's memorandum or in his oral argument. Since he has not dignified these matters by way of supporting argument, we take it that he has waived them, as well he might, since they are clearly devoid of merit.[1]

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[1]The first two points which are raised by the motion, but not supported by the memorandum or argument, are that the verdict was contrary to the weight of the evidence and not supported by substantial evidence. As we shall point out, later in this opinion, the evidence of defendant's guilt was overwhelming, and in light thereof it would have been a miscarriage of justice had the jury acquitted. The motion also alleges that the Court erred in charging

II. Waiver of Right to Counsel.

The first point which defendant urges is that "defendant was not capable of competently and intelligently waiving his constitutional right to assistance of Counsel."

Although the Sixth Amendment to the United States Constitution preserves the right to be assisted by counsel, it is clear that said right may be waived. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). Indeed, the constitutional right "does not justify forcing counsel upon an accused who wants none." *Moore v. Michigan*, 355 U.S. 155, 161 (1957); *Linden v. Dickson*, 278 F.2d 755, 763 (9th Cir., 1960); *MacKenna v. Ellis*, 263 F.2d 35, 41 (5th Cir., 1959), cert. den. 360 U.S. 935 (1959); *United States v. Cantor*, 217 F.2d 536, 538 (2d Cir., 1954). And, a conviction will be reversed if it appears that a trial court has compelled a defendant to be represented by counsel against his will. *Reynolds v. United States*, 267

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the jury and in refusing to charge the jury as requested. Quite aside from the fact that defendant has, under Rule 30 of the Federal Rules of Criminal Procedure, waived his right to assign error because he failed to object to the instructions before the jury retired we cannot even find one statement by defendant at this time which points out where the Court erred, except his reference to the so-called Allen instruction, with which matter we deal extensively later in this opinion. Suffice it to say that the instructions were a fair, complete and accurate statement of the applicable principles of law. The motion also alleges that the Court denied the defendant the right to cross-examination. Beside the fact that the record shows exactly to the contrary, we note that defendant has failed to cite instances of this alleged conduct on the part of the Court, unless, of course, he had in mind the occasions when the Court reprimanded or otherwise cautioned defendant as to the rules relating to the proper scope of cross-examination.

F.2d 235, 236 (9th Cir., 1959); *compare United States v. Cantor, supra,* at 538, where the court observed that appointment of counsel amounted to "some curtailment of his right to proceed alone, and if any prejudice to the appellant was the result of that the judgment should be reversed."

There can be no doubt but that defendant had waived his right to assistance of counsel. On June 16, 1960, some two and a half months prior to the commencement of trial, a hearing was held in open court for purpose of arraignment, at which time this Court asked defendant whether he was represented by counsel, to which question defendant responded in the negative. *Reporter's Transcript of Procedings,* vol. I, p. 4, lines 14-16 (hereinafter cited as Tr.). The Court specifically advised him that he had a right to be represented by counsel, Tr., vol. I, p. 4, lines 17-20, and then inquired as to whether defendant had sufficient funds with which to employ counsel. Tr., vol. I, p. 4, lines 21-22. Mr. Redfield responded by stating: "I do not wish representation." Tr., vol. I, p. 4, line 23. Within a moment or so, defendant again stated: ". . . I would prefer to represent myself." Tr., vol. I, p. 5, line 3. There then followed the following colloquy: "The Court. Very well. It is your desire, then, that you not be represented, but that you represent yourself in this case? Mr. Redfield. That is my desire. The Court. And on the basis of that you have refused the Court's offer to appoint counsel for you? Mr. Redfield. Yes, your Honor." Tr., vol. I, p. 5, lines 9-15.

There followed various hearings and informal conferences between defendant and this Court, all of which will be discussed presently. However, on the first day of the trial, October 4, 1960, the transcript shows the following:

> "The Court. The record will indicate that the defendant, LaVere Redfield, has heretofore waived the right to have an attorney, and has elected to represent himself.
>
> Is that correct, Mr. Redfield?
>
> Mr. Redfield. That is so, your Honor." Tr., vol. I, p. 39, lines 24-25; p. 40, lines 1-3.

Since the record is crystal clear that there was a waiver of counsel, the remaining question is whether there has been a competent, intelligent and understanding waiver, which problem we shall deal with in Section III, *infra*. But, we must first consider defendant's argument, raised in his memorandum at page 6, that "the record in the case at bar does not establish that the Court made any determination as to whether or not defendant competently and intelligently waived his right to Counsel." This argument was extended in the March 3, 1961 hearing, when defendant apparently took the position that a new trial was required *because* this Court allegedly did not make a finding of record. Indeed, if we understand him, defendant asserts that there was reversible error because this Court did not have a special hearing, presumably one akin to the hearing we have under 18 U.S.C. sec. 4244.

Should this Court determine at this time that defendant did not properly waive his right to assistance

of counsel, then of course he is entitled to a new trial. But, it is quite another matter to ask for a new trial on the ground that there was no formal hearing and determination of record at the time defendant did waive his right.

Defendant relies heavily on the passing statement in *Johnson v. Zerbst,* 304 U.S. 458, 465 (1938), that "while an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

The Court of Appeals for the Ninth Circuit answered defendant's argument in the case of *Widmer v. Johnston,* 136 F.2d 416, 418 (9th Cir., 1943), cert. den. 320 U.S. 780 (1943). There the Court noted that its attention had been directed to the passage quoted from *Johnson v. Zerbst.* It went on to hold, however:

> "While it would doubtless be a better practice to record the fact of a determination of proper waiver of counsel, still the failure to do so does not negative that such determination was made. The recordation would go merely to the matter of proof." 136 F.2d at 418.

We might agree with defendant had there been any indication at the time of his waiver that defendant was not possessed of his complete mental faculties. Under those circumstances, it may have been appropriate to have had a psychiatric hearing. But, in *Hall v. Johnston,* 103 F.2d 900 (9th Cir., 1939), it

was pointed out that at the time of the defendant's plea of guilty the trial judge knew that defendant was insane, 103 F.2d at 900; yet, the Court of Appeals did not order a reversal of the conviction, but merely remanded for a present hearing as to whether defendant understandingly waived his right to counsel. 103 F.2d at 901.

It is all too easy to say at this stage of the proceedings what would have been the most wise course of action to follow at the time defendant waived his right. Even in light of the passage from *Johnson v. Zerbst,* however, the Courts of Appeals time and again have affirmed convictions or denied writs of habeas corpus where no more, and often less, was done by the trial court than was done here. See, *e.g., Williams v. Swope,* 186 F.2d 897, 898-900 (9th Cir., 1951); *O'Keith v. Johnston,* 129 F.2d 889, 891 (9th Cir., 1942), cert. den. 317 U.S. 680 (1942); *Binder v. United States,* 231 F.2d 314, 314-15 (6th Cir., 1956), cert. den. 351 U.S. 969 (1956); *Smith v. United States,* 216 F.2d 724, 726 (5th Cir., 1954); *Ray v. United States,* 192 F.2d 658, 659 (5th Cir., 1951); *Woolard v. United States,* 178 F.2d 84, 88 (5th Cir., 1949); *Ossenfort v. Pulaski,* 171 F.2d 246, 247 (5th Cir., 1948); *Wood v. Howard,* 157 F.2d 807, 808 (7th Cir., 1946), cert. den. 331 U.S. 814 (1947).

In any event, although we desire to go on record as holding that, at least where there is no prima facie indication that a defendant is mentally incompetent, there is no need to have a special hearing of record, psychiatric or otherwise, to determine whether a de-

fendant competently has waived his right to counsel, we further hold that the failure to have such a hearing in this case is not ground for a new trial, since, as we shall show, defendant did competently waive his right to counsel. In other words, even assuming *arguendo* that such special hearing was necessary, the lack of it did not prejudice this defendant, and, as we pointed out earlier, new trials will be granted a defendant only when there is a clear showing that the alleged error resulted in prejudice to him.

III. Defendant Waived His Right to Counsel in an Intelligent, Understanding and Competent Manner.

Our purpose now is to reaffirm the previous determination of this Court that defendant did competently, intelligently and understandingly waive his right to counsel. Although a formal determination of record was not made at the time defendant waived his right, the Court had an adequate opportunity to discuss the matter with defendant, both on and off the record, and did determine for itself that defendant's choice to appear *pro se* was made with his "eyes open." See *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

To begin with, this defendant cannot say here, as did the defendant in the famous case of *Johnson v. Zerbst, supra*, at 467, that he was unaware of his right to be represented by counsel. The Court advised him of that right. Tr., vol. I, p. 4, lines 17-20.

The Court then determined that defendant was financially able to retain counsel if he desired to do so.

Tr. vol. I, p. 4, lines 21-25, p. 5, lines 1-8, p. 31, lines 10-18. Since defendant was able to retain counsel, it was not necessary to appoint counsel. See Rule 44, *Federal Rules of Criminal Procedure* ("if the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding *unless he elects to proceed without counsel or is able to obtain counsel.*"); *United States v. Arlen*, 252 F.2d 491, 495 (2d Cir., 1958) ("counsel need not be assigned if a defendant is able to obtain his own counsel . . ."). Nonetheless, defendant knew of and refused the Court's offer to appoint counsel for him. Tr., vol. I, p. 5, lines 13-15.

It is clear, then, that defendant was well aware of his constitutional and statutory rights.

The next fundamental question is whether defendant knew what he was getting into. Did he appreciate that any law suit is complicated, at least to a layman, and that a criminal charge is a matter not to be dealt with lightly? The record shows that he did.

The Court pointed out that no matter how skilled the layman is in the fundamental rules of law, no lay person is very familiar with procedural aspects, and that that fact makes it difficult both for the defendant appearing *pro se* and for the Court. Tr. vol. I, p. 7, lines 5-12. The Court asked defendant whether he thought the trial of the charges against him was child's play, to which he replied that he had no such thought. Tr., vol. I, p. 17, lines 19-25, p. 18, lines 1-2. The

Court impressed upon defendant that he was in an important and grave situation, and the defendant with a seriousness which the cold record does not show, responded that he was aware of those facts. Tr., vol. I, p. 18, lines 3-7.

The defendant was well aware of the charges against him. Upon arraignment, the indictment was read to him, and a copy was handed to him. Tr., vol. I, p. 6, lines 6-14. As a matter of fact, as we shall discuss *infra*, the defendant was sufficiently aware of what was going on that he demanded a bill of particulars. The Court advised him of the possible penalties should he be adjudged guilty. Tr., vol. I, p. 7, lines 17-23. This defendant knew of the ultimate consequences should his prosecutors prevail.

What this Court has so far related is important in that it shows that defendant was well aware of what he was doing. Significant, however, is the manner in which defendant made his statements and responded to the queries of the Court. Everything that he did or said was done in a calm, deliberate and convincing manner. When he stated that he desired to represent himself, there was no hesitation in his voice. When he stated, "I feel I am competent to defend myself," Tr., vol. I, p. 14, line 20, he did so with that convincingness that comes from the totally rational man who speaks with a soft voice. At all times relevant to the matter now under inquiry he was alert, courteous, and determined. Who will deny that "the demeanor, the facial expression, and the responses made by the

accused soon may convincingly disclose to an experienced trial judge whether the accused is intelligently and understandingly waiving his constitutional rights." ? *Davis v. United States,* 123 F.Supp. 407, 412 (D. Minn., 1954), affirmed 226 F.2d 834 (8th Cir., 1955), cert. den. 351 U.S. 912 (1956).

Although it is not totally uncommon for a defendant to waive counsel,[2] this Court was concerned about defendant's determination to do so, mainly because of the type of suit here involved. Defendant, whether represented or not, would not have an easy time of it, since from past experience the Court knew that the government would be well prepared, as, indeed, it was. Between the time of arraignment on June 16, 1960 and the time the trial began, on October 4, 1960, this Court had occasion to meet with defendant *in camera.* There were three to five such conferences, often as not dealing with defendant's desire to obtain a bill of particulars. On at least two of these occasions, there may have been more, the Court frankly discussed the matter of waiver with defendant, told him what he was getting into, and virtually pleaded with him to reconsider his determination to appear *pro se.* The defendant was adamant, but not in a belligerent manner. It was simply a case where an undeniably intelligent businessman had made an assessment of

[2]A check of the records for the Las Vegas division of this Court shows that during 1960 there were 93 defendants who entered pleas to criminal charges, 10 of whom waived counsel. Some 49 defendants were sentenced in Las Vegas, 10 of whom waived counsel at the time of imposition of sentence.

where he stood and what he wanted to do about it. He was stubborn about his decision, but gave absolutely no indication that he did not know exactly what he was doing.

Which leads us to another matter. It needs no citation to the transcript or otherwise for this Court to note that defendant is an eminently successful financier. He has amassed a considerable fortune, and in the course of doing so doubtless had to make decisions on which could turn the fate of hundreds of thousands, if not millions, of dollars, a subject which even he asserts is dear to his heart. See defendant's memorandum in support of this motion, p. 26, lines 25-26, where Dr. Raymond Brown states that "he has quite literally placed money about his life in his perseeptive of values." This then, was not one of those waiver-of-counsel cases where the court found a 17 year old defendant, who had never gone beyond the third grade, who had had virtually no contact with the outside world, and who was not accustomed to making decisions which were extremely important to him. In short, this Court respected the man for what he was; there was no question in the Court's mind but that however poor his judgment may have been, the defendant's waiver of counsel was done in an intelligent, understanding and competent manner.

Once he had waived counsel, the Court made it plain to defendant that "it can't be an attorney for you; it can't tell you what to do, how to do it, or when to do it." Tr. vol. I, p. 18, lines 11-12. The Court

also impressed upon him that he had no more standing because he was defending himself than would any other person. Tr., vol. I, p. 18, lines 21-23. All of this he gave every indication of having understood. Despite this clarification of the ground rules, so to speak, the defendant never waivered from his determination to appear *pro se*.

So much, then, for the factual background upon which this Court based its conclusion that there was a proper waiver of counsel, a conclusion, though not expressed as a matter of record, was one which was uppermost in the Court's mind when it decided to allow defendant to defend himself.

But, we are now told by psychiatrists of defendant's own choosing that he was incompetent to waive his right. On the other hand, one psychiatrist chosen by the government states that he cannot reach a conclusion, and the other unequivocally states that defendant did competently and intelligently waive his right. Nothing would be gained by adding up the "votes," as it were, and then reaching a conclusion one way or the other. We deem it our function to compare these reports, and then to evaluate them in light of the findings which this Court has made and will make on the basis of its own observations.

Drs. Raymond Brown and Toller, both of whom were retained by defendant, say, in essence, that defendant is obsessed with money, that he has a compulsion to make money and that money assumed more than natural proportions to him. When they point out

that he has certain eccentric characteristics, both rely on incidents which show that defendant is parsimonious. Dr. Raymond Brown mentions ambulatory schizophrenia, while Dr. Toller alludes to the possibility. Dr. Raymond Brown concludes that defendant has a distorted sense of values, which conclusion obviously relates to defendant's great desire for money. Dr. Toller says that defendant gives as a reason for waiver of counsel the fact that he would have to earn too much money to pay for fees. In short, both men seem to agree that somehow or other the decision to waive counsel was motivated by an inner desire to save money. Dr. Raymond Brown concludes that the decision to appear *pro se* was motivated by irrational factors, which simply means that it is that doctor's opinion that the decision to maintain his fortune by doing without counsel is irrational.

On the other hand, Dr. Gericke, who was retained by the government, disputes Dr. Raymond Brown's judgment that the decision was irrational. Said Dr. Gericke: "His thinking and behavior appear reasonable, and he suffered no disorder of thinking which would render his actions irrational or unwarranted. He acted in the exercise of his best judgment."

In an apparent attempt to pin-point a specific mental disorder which allegedly caused defendant to sacrifice representation by counsel merely because he could save some money, Dr. Raymond Brown speaks of "extreme obsessive compulsive traits" and Dr. Toller states that the defendant "has a psycho-neurosis, com-

pulsive type." Dr. Gericke, who had before him the Brown-Toller reports at the time he made his findings, concluded, however: "There is no evidence of impulsiveness nor emotional instability." Quite aside from the obvious fact that the experts do not agree, this Court is of the opinion that to say that defendant has a compulsive desire to accumulate wealth is of no help in this case. Many people have compulsive desires to make money, and often as not wind up in a hospital because of various illnesses induced by overwork. But, although these men, many of whom are members of our profession, may be said to exercise poor judgment, few could doubt that their actions are competent, intelligent, or understanding in the legal sense. Or, as Dr. Richard Brown, who was retained by the government, has succinctly put it: "Some of the possibilities would be that he simply wanted to save money. This would represent poor judgment but if the man were psychotic and felt, for example, that he had to have money to keep away the devil, his judgment would be based on a delusion." In this connection, both Drs. Toller and Gericke agree that defendant has not been suffering from hallucinations, and none of the experts has concluded that defendant is psychotic. Dr. Toller's view that defendant is suffering from a psycho-neurosis unquestionably cannot be taken as a conclusion that he is psychotic, for the term "psycho-neurosis" is commonly used merely as a synonym for "neurosis." *Chapman v. Finlayson Lease*, 56 Ariz. 224, 107 P.2d 196, 198 (1940); *O'Kelly & Muckler, Introduction to Psychopathology* 202 (2d ed., 1958) ("The term psychoneurosis is used inter-

changeably at present with the shorter term neurosis.").

We would be concerned if there had been a finding that defendant was suffering from a psychosis, but there is a vast difference between that type of mental illness and a neurosis. To begin with, we are told that a neurosis is a "mild functional personality disorder in which there is no gross personality disorganization and in which the patient does not ordinarily require hospitalization." *Coleman, Abnormal Psychology and Modern Life* 632 (1950). More precisely, the "psychoneuroses are mild or minor mental reactions which represent attempts to find satisfaction in life situations rendered unsatisfactory by faulty attitudes or by faulty emotional developments." *Strecker, Ebaugh & Ewalt, Practical Clinical Psychiatry* 358 (6th ed., 1947). "The psychoses, on the other hand, are usually disordered reactions of such intensity or such inclusiveness with respect to all parts of the personality that any sort of compromise with normal social requirements is impossible." *O'Kelly, op. cit. supra,* at 202-03. Unlike the neurotic, "the behavior in the psychotic is usually unpredictable and very frequently anti-social to the extent that it makes him dangerous to himself or to the persons around him. The psychotic does not appreciate the rights of other persons and thus has difficulty in conforming to the demands and mores of the group in which he lives. In a few words, the psycho-neurotic patient generally is in much closer contact with his environment than the psychotic and, as it were, far fewer phases of his per-

sonality are in obvious disharmony with the responsibilities and expectations of everyday living." *Strecker, op. cit. supra,* at 358-59. See also, *Coleman, op. cit. supra,* at 233.

Even assuming for purposes of argument that Dr. Toller was correct in his diagnosis of neurosis, diagnosis which, we hasten to point out, is not concurred in by the other psychiatrists, how much weight should we give to it, bearing in mind that we have cited authorities which classify a neurosis as being only a mild or minor mental reaction? Should we be more concerned here than was the Court of Appeals for the Fifth Circuit, when it found that there was a competent waiver, even though one of two psychiatrists there had testified that that defendant was suffering from manic depression insanity and could not even stand trial? *Kaplan v. United States,* 241 F.2d 521, 522, n. 3 (5th Cir., 1957), cert. den. 354 U.S. 941 (1957). Should we find no valid waiver when the Court of Appeals for the Second Circuit found a valid one even though two psychiatrists had testified that the defendant there "was a psychopathic personality and in need of treatment . . . "? *United States ex rel. Rhyce v. Cummings,* 233 F.2d 190, 194 (2d Cir., 1956), cert. den. 352 U.S. 854 (1956).

This Court desires again to point out that defendant is not a man inexperienced in making decisions as to how to spend his money. Just because he used what may have been an inordinate amount of care on the occasion here in question, why should we say now that his actions are any less competent, intelligent

and understanding than the man who refuses to take out that extra, but needed, fire insurance on his home, or the man who refuses to retain counsel because he believes he is guilty and that nobody can help him?

Let us pass, for the moment, to the idea expressed by Drs. Raymond Brown and Gericke that one reason behind defendant's waiver may have been his innate belief that he was innocent, that truth would ultimately prevail and that the jury would therefore acquit. From these premises, we are to gather, the defendant assumed that he did not need counsel, for representation would be an idle act.

As a legal proposition, we cannot accept this line of reasoning. This is because no matter what defendant may have told the psychiatrists about his being innocent, this Court is bound by the finding of the jury that he *willfully* evaded income taxes. A man who willfully does acts which constitute a crime, a man who, we have found, understood the nature of the charges against him, is not a man who can honestly say that he knows he is innocent.

Whatever may have been defendant's real reasons for waiving counsel,[3] it is quite possible that the psy-

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[3]Of course, it is admittedly difficult to delve into a person's mind and determine what his "real" reason was for pursuing a given course of conduct. Aside from the reasons advanced by two of the psychiatrists, however, the Court should like to make its own suggestion. Defendant knew that since a unanimous verdict would be necessary to convict him, his chances of acquittal were favorable. He also knew that the transactions which the government would have to prove were extremely complicated and likely as not could not be traced by the Internal Revenue Service, much less by a jury of lay persons. Here, of course, defendant underestimated the

chiatric reports, especially those submitted by defendant, suffered from the fact that defendant was less

perseverance of Mr. Martin Hoffenblum, Special Agent for Internal Revenue Service. When we refer to these complicated transactions, we are thinking of the confounding manipulations concerning the Reno Brewing Co. and those involved in the sale of 89,800 shares of the stock of Pacific Clay Products Co., a sale involving in excess of one Million dollars. Even if he wanted to explain to an attorney the schemes which he used to hide income, we have grave doubts that most lawyers could gain a sufficient familiarity with what had transpired so as to be able effectively to combat the government's case. In fact, defendant knew more about the subject matter of the suit than even the government did. For example, despite intensive investigation, it was only in the course of Mr. Redfield's defense that the government was able to uncover one more of the often-used nominee accounts, that of Myra McCue. See Tr., vol. VI, pp. 1631, 1633, Tr., vol. VII, pp. 1656, 1712.

Is it too far-fetched to believe that, say, when it came time to cross-examine government witnesses, Mr. Redfield could not honestly believe he was more competent than an attorney?

Since, because of what we have just stated, defendant could believe that he had a reasonable chance of being acquitted, is it not possible that another thought crossed his mind, namely, that he could play upon the sympathy of the jury? After all, here would be a man, small in physical stature and unskilled in the technicalities of the law, facing a battery of highly competent government attorneys and agents. Under those circumstances he could say, as he did: "In my case I am interested only in the true facts of the case; the complete and thorough presentation of all facts concerning this case, and if that is presented I have no fear, no hesitancy as to what the judgment of this jury will be." Tr., vol. I, p. 146, lines 3-6. He could also say to the jury, as he did: "I, of course, am not an attorney. I know absolutely nothing about the law. • • • • Those who know the law may have an advantage over me, in that they might know something to do or something to say—shall we say tricks of the trade . . . ." Tr., vol. I, p. 145, lines 9-10, 17-19. He could accuse, as he did, the government of using "unsavory tactics," Tr., vol. VIII, p. 2012, lines 7-9, and he could raise the cry of "Gestapo tactics." Tr., vol. VIII, p. 2012, lines 24-25, p. 2013, lines 1-4. He could also insinuate that he was being "singled out for special treatment." Tr., vol. VIII, p. 2013, lines 6-7.

In short, this Court is suggesting that perhaps defendant's decision to appear without counsel was a careful calculation, albeit an incorrect one as it turned out, by an undeniably shrewd man, who was well aware of his rights and knew exactly what he was doing.

than candid during his examinations. Dr. Richard Brown has stated: "One thing does stand out with this man; he is not revealing all that he knows." That, incidentally, was a characteristic revealed by defendant during the course of the inquiry by the Probation Officer as the latter was preparing his presentence report. In any event, the assertion that defendant was withholding from his examiners, an assertion which stands uncontradicted, cast grave doubts on the conclusions of Drs. Raymond Brown and Toller that defendant did not validly waive his right to counsel.

But, even taking these two reports at face value, something which we would not be required to do even if they went unchallenged, *Blodgett v. United States*, 161 F.2d 47, 56 (8th Cir., 1947), how can they be squared with the conclusion reached by this Court, at the time of the waiver, that defendant acted in a competent, rational and intelligent manner? The short of it is that they cannot.

Before proceeding further, however, this Court will observe that a careful reading of the numerous cases in this area indicates that the courts, in determining whether there has been a valid waiver, will consider the entire record of the case. Indicative of this approach is the statement appearing at page 464 of the opinion in *Johnson v. Zerbst, supra:* "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surround-

ing that case, including the background, experience, and conduct of the accused."

Perhaps it is because of this approach to the problem that the courts in the *Kaplan* and *Cummings* cases, *supra,* ruled that the waivers did meet the constitutional test, even though psychiatrists had opined to the contrary.

In line with the idea that the courts are to consider all relevant circumstances, we cite at least one case where the court took into account the fact that defendant was no stranger to the courts. See *Williams v. Swope,* 186 F.2d 887, 889 (9th Cir., 1951). Such factor is relevant because it shows that the defendant who has been in court before knows that a trial is a serious proceeding, that there are certain procedures which must be followed and that the managing of a case is within the peculiar competency of a member of the bar. A person who on numerous occasions has been a litigant cannot be said to be ignorant of the functions served by an attorney, and hence, when he waives his right to counsel, we can only assume that he did so with his eyes open, assuming as we do that the defendant knew he had a right to counsel. It is because of the insight which a person gains from litigating that we deem it irrelevant that his prior court experiences were civil in nature.

Although this Court was dimly aware of the fact that the defendant had been engaged in several law suits prior to the one here in question, it did not take

into account then, as it does now, that defendant has had extensive court experience.[4] This Court takes judicial notice of the fact that defendant represented himself in the case of *Securities & Exchange Commission v. Redfield,* United States District Court for the District of Massachusetts, Docket No. 55-68W (1955). For what it is worth, we note from a newspaper clipping dated February 16, 19[illegible] that Judge Wyzanski inquired of Mr. Redfield whether he had funds sufficient to employ an attorney. Mr. Redfield responded in the affirmative, added that he did not need a lawyer, and the record shows that he continued to represent himself right up to the very time judgment was entered against him.

We also take judicial notice of the fact that defendant represented himself in the case of *Guild v. Redfield,* Second Judicial District Court of the State of Nevada, Docket No. 185,955 (1960). With respect to that case, we further note the affidavit of one of the plaintiffs, a member of the bar of this Court, that defendant there "appeared to be fully competent to represent himself."

Finally, we take judicial notice of the fact that Mr. Redfield appeared, either as plaintiff or defendant,

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[4]In addition to the cases to which he was a party, defendant served as a member of the federal grand jury for the District of Nevada from November 25, 1957 through April 23, 1959. That particular panel returned 24 indictments, ranging from Dyer Act violations to false representation as a citizen, and from narcotics violations to misapplication of bank funds. This experience must have contributed to defendant's knowledge that criminal prosecutions are not matters to be dealt with lightly.

in some sixteen additional actions, all of which were before the Second Judicial District Court of the State of Nevada, unless otherwise noted.[5]

We cite all of this not to indicate that defendant is not entitled to the full measure of his constitutional rights, but only to show that he was no stranger to courts and that such fact points to a conclusion that he knew exactly what he was doing when he waived his right to counsel.

In conclusion, we note that it is settled law that the defendant "has the burden of showing, by a preponderance of the evidence, that he did not have counsel and did not competently and intelligently waive his constitutional right to the assistance of counsel." *Moore v. Michigan*, 355 U.S. 155, 161 (1957); *Watts v. United States*, 273 F.2d 10, 11-12 (9th Cir., 1959), cert. den. 362 U.S. 982 (1960); *O'Keith v. Johnston*, 129 F.2d 889, 890 (9th Cir., 1942), cert. den. 317 U.S. 680 (1942); *c.f., Blood v. Hudspeth*, 113 F.2d 470, 471 (10th Cir., 1940) (ordinarily it will be presumed that the waiver was valid); *c.f. Kelly v. Aderhold*, 112 F.2d

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[5]*Steinheimer v. Redfield*, Docket No. 54,883 (1936); *Washoe County v. Bushard*, Docket No. 128,289 (1950); *Bell Telephone Co. v. Bushard*, Docket No. 131,968 (1950); *Redfield v. First National Bank*, Docket No. 147,426 (1953); *City of Reno v. Bushard*, Docket No. 150,375 (1954); *Lyons v. Redfield*, Docket No. 150,763 (1954); *Baker v. Boyd*, Docket No. 151,296 (1954); *Commercial Credit Corp. v. Mathews*, Docket No. 160,234 (1956); *State of Nevada v. Bushard*, Docket No. 162,707 (1956); *Reno Brewing Co. v. Redfield*, Docket No. 163,756 (1956); *Wantz v. Redfield*, Docket No. 166,967 (1957); *Redfield v. Chisholm*, Docket No. 168,120 (1957); *Redfield v. Peterson*, Docket No. 175,558 (1958); *A. L. Jameson & Co. v. Redfield*, 4 P.2d 817 (Cal.App., 1931); *Redfield v. Barnhart-Morrow Consolidated*, 60 P.2d 887 (Cal.App., 1936); *Dunbar v. Redfield*, 61 P.2d 744 (Cal., 1936).

118, 119 (10th Cir., 1940) (same as *Blood v. Hudspeth, supra.*) Upon a consideration of all the evidence—the psychiatric reports, the statements and conduct of defendant, his past experiences both in and out of court, and his demeanor—this Court finds that defendant has not met the burden of proof which the above-cited cases place upon him. Accordingly, we find as fact, *Michener v. Johnston,* 141 F.2d 171, 175 (9th Cir., 1944), that defendant waived his right to counsel in a competent, intelligent and understanding manner.

IV. Defendant Was Not Denied a Fair and Impartial Trial, Nor Were His Rights Under the Sixth Amendment Violated by Virtue of the Nature of His Defense.

The next major point is defendant's contention that he "was denied his constitutional right to a fair and impartial trial because defendant, acting as his own Counsel, was not capable of conducting his defense and the record of the trial in this cause establishes that defendant was so ignorant of law and procedure and his defense was so inadequate and incompetent that he has been deprived of his liberty in violation of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States." *Defendant's Memorandum of Points and Authorities,* p. 7.

Of course, defendant does not here allege that defendant was incompetent to stand trial. That much was settled at the hearing on March 3, 1961. What

defendant is saying is that he was not capable of doing for himself that which we might reasonably expect of an attorney.

Before going further, we pause to note that defendant's counsel show a lack of understanding of the law applicable to this case in that it is elementary that the Fourteenth Amendment has no bearing whatever on criminal prosecutions in the federal courts.

We have already determined, it will be remembered, that defendant validly waived his right to counsel and that we could not force counsel upon him under those circumstances. Now, however, defendant tells us that his Sixth Amendment rights were impaired because he allegedly did a poor job of representing himself. This, in effect, is a contention that competency to waive counsel can only exist if the defendant is qualified to try a law suit. The case law does not even suggest such a possibility.[6] Indeed, the Supreme Court has held that when a lawyer-defendant waives counsel, the fact that he has had professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel, "but it is by no means conclusive." *Glasser v. United States*, 315 U.S. 60, 70 (1942). By negative inference, therefore, the fact that one is not an attorney should not be of any consuming concern.

What, then, can be expected of this Court? Were we supposed to give defendant a course in the art of

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[6]As a matter of fact, the language which we have quoted *infra* from our Circuit's opinion in the *Burstein* case indicates that lack of skill in representing oneself has nothing at all to do with rights under the Sixth Amendment.

trying a law suit? To state the question is to state the answer. Were we supposed to coach him every step of the way, tell him what to ask of witnesses—in short, act as counsel for him? To do so would clearly have transcended the proper functions of the court. The Court of Appeals for the Ninth Circuit put it well when it stated:

> "When appellant chose to proceed without counsel, he chose a course of action fraught with the danger that he would commit legal blunders. But having made that choice he did not thereby acquire the right to have the court act as his counsel whenever he seemed to be blundering. *It cannot be said that the court denied him representation of counsel, or denied him a fair trial, because the judge refrained from intermeddling.*" *Burstein v. United States,* 178 F.2d 665, 670 (9th Cir., 1949) (emphasis added).

Or, as the Court of Appeals for the Fifth Circuit has put it: "Once it is found, however, that such an accused has properly waived his right to counsel, the effects flowing from that decision must be accepted by him, together with the benefits which he presumably sought to obtain therefrom." *Smith v. United States,* 216 F.2d 724, 727 (5th Cir., 1954). See also, *Michener v. United States,* 181 F.2d 911, 918 (8th Cir., 1950) ("If an accused were represented by counsel, it most obviously is not the duty nor the privilege of the judge to suggest or explain possible defenses in behalf of the accused. And upon finding a competent, intelligent and intentional waiver of counsel, it is not then any the more the duty of the trial judge to advise an accused respecting possible defenses.").

Notwithstanding what we have just said, however, the Court did, on numerous occasions, give advice to defendant or otherwise help him to defend himself.[7] Moreover, as our Circuit commented in another case, "the manner in which he handled himself show[s] that although his ideas of a defense were extraordi-

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[7]We cite the following only as some of the relevant examples. No attempt has been made to exhaust the transcript.

The Court carefully explained to defendant the nature of the two types of challenges to the jury during the process of impanelling, how many challenges were allowed to the various parties and the procedure to follow. Tr., vol. I, p. 41, lines 15-23; p. 62, line 25 - p. 63, line 2; p. 66, lines 5-15; p. 66, line 21 - p. 67, line 17; p. 69, lines 11-23; p. 78, line 3 - p. 79, line 8.

The Court explained the rule excluding witnesses from the courtroom until they are called to testify. Tr., vol. I, p. 130, lines 11-25.

The Court cautioned defendant to scrutinize offers of documentary evidence before he stipulated to their admission, and advised defendant to assert his right even "if the Court gets a little fast." Tr., vol. I, p. 154, line 19 - p. 155, line 1.

The Court explained the scope of proper cross-examination. Tr., vol. III, p. 633, lines 12-20.

The Court suggested the proper form of questions. Tr., vol. III, p. 635, lines 4-24; p. 787, lines 9-12; and Tr., vol. V, p. 1380, lines 22-24; p. 1382, lines 1-2.

By way of direct assistance to defendant, the Court let down the ordinary rules of evidence and procedure by allowing defendant, during his cross-examination of government witnesses, to elicit direct evidence as to his reputation. Tr., vol. III, p. 633, line 7 - p. 634, line 9; and Tr., vol. V, p. 1285, lines 3-16. The Court allowed certain of defendant's questions to stand, even though they were improper. Tr., vol. IV, p. 892, lines 11-18; p. 1112, lines 6-14. The Court even asked defendant certain questions during the latter's cross-examination of a government witness, with the result that defendant was enabled to bring out facts that would always have to be brought out during his own case in chief. Tr., vol. IV, p. 870, line 7 - p. 871, line 23.

Defendant will not deny that during the earlier-mentioned conferences between defendant and the Court, all of which were held in chambers, the Court carefully advised defendant of his rights and the procedure to be followed in connection with his demand for a bill of particulars.

Finally, as we shall point out later in this opinion, the Court fully and carefully explained to defendant the proper scope and subject matter of a closing argument.

narily unorthodox, he was alert and intelligent." *Burstein v. United States, supra,* at 670.[8]

[8]By way of partial example only, and without attempting to exhaust the record, we would note the following:

The defendant was sufficiently alert to make objections to proffers of testimony or documents. See, for example: Tr., vol. I, p. 188, line 9 p. 191, line 7 (tax returns outside of indictment years); Tr., vol. I, p. 193, lines 1-8 (same); Tr., vol. I, pp. 194-95 (photostatic copies of documents); Tr., vol. II, p. 347, lines 3-4 ("you are putting words in the witness' mouth . . . ."); Tr., vol. III, p. 616, lines 6-24 (deposit slips outside of indictment years); Tr., vol. III, p. 624, lines 24-25 (ledger sheets outside of indictment years); Tr., vol. III, p. 644, lines 11-12 (document remote in time); Tr., vol. III, p. 677, lines 18-20 (checks outside of indictment years); Tr., vol. III, p. 687, lines 13-14 (same); Tr., vol. IV, p. 846, line 14 - p. 847, line 1 ("Your honor, yesterday just before adjourning for the noon recess, I was handed what is called a supplemental bill of particulars by counsel for the plaintiff, and upon what search I made I find that where a pretrial bill of particulars has been rendered, which was done on September the 10th, the Government's proof is measured and limited by the statements made in said bill of particulars, and it is not permitted that they can be amended of [by?] a supplemental bill of particulars brought in during the course of trial, and I have here a notation of points and authorities in support of that contention."); Tr., vol. IV, p. 900, lines 10-11 ("Objected to, your Honor, on the basis that it calls for a conclusion of the witness."); Tr., vol. IV, p. 993, lines 5-10, 23-24 (testimony as to subject matter not included in bill of particulars); Tr., vol. V, p. 1192, lines 13-14 and p. 1193, lines 2-6 (testimony of witness in toto); Tr., vol. V, p. 1225, lines 12-16 (tax return outside of indictment years); Tr., vol. V, p. 1240, lines 3-5 (best evidence rule); Tr., vol. V, p. 1241, lines 6-8 ("These likewise are objected on on the basis that they are not the best evidence, that the originals are the best evidence.")

Though defendant may be technically correct in saying that he "did not register twenty objections during the entire four-week trial," the statement misses the point. This is because counsel fails to point out, even at this time, those proffers of evidence which were subject to objection. Furthermore, the objections which defendant did make suggest that he was alert and ever conscious to preserve his rights.

We cannot take too seriously defendant's statement that he "had no idea how to conduct a cross-examination of an adverse witness." Although he may have not revealed the skill or glibness of television's Perry Mason, the record shows that he had an excellent grasp of the facts in question and that he was alert to bring out any information possessed by the witness which would help his own case. See, for example, his cross-examination of

The case cited by defendant, *Lance v. Overlade*, 244 F.2d 108 (7th Cir., 1957), is inapposite because that

Harold S. Chisholm, Tr., vol. III, pp. 784-804; of William Rollo, Tr., vol. III, pp. 809-10 (wherein defendant carefully attempted to set the stage for a claim that the Oregon-Nevada Lumber Co. was nothing other than a dummy corporation); of Richard M. Hughes, Tr., vol. III, pp. 814-15 (same); of Roland N. Dohr, Tr., vol. III, pp. 827-30 (wherein defendant elicited testimony that profits made by him, allegedly on behalf of Reno Brewing Co., were received by said firm); of Tsung S. Fong, Tr., vol. V, pp. 1157-1159 (wherein defendant brought out that with respect to the nominee account there in question he had never been requested to pay dividends to the nominee); of Sarah E. Dolan, Tr., vol. V, pp. 1173-74 (wherein defendant was able to get into the record that this particular nominee never had any occasion to doubt the manner in which he was handling her account and that he was a most generous man); of Harry M. Green, Tr., vol. V, pp. 1244-47, 1248 (wherein defendant was able to get an Internal Revenue Agent to admit that he had no personal knowledge that the interest payments there in question were ever made to defendant); of Mona Riepen, Tr., vol. V, pp. 1280-83 (wherein defendant elicited from this nominee-account witness that he did pay to her certain profits from the account carried in her name); of Willard D. Snow, Tr., vol. V, pp. 1302-09 (wherein defendant brought out that the witness did not know in whose name the particular stock there in question was held nor who received the proceeds from the sale of same). One familiar with all the evidence in the trial can see that defendant was quick to point out inaccuracies in the direct testimony of the government witnesses and, as we shall observe later in this opinion, he was seldom prone to pass up the opportunity to argue with the witnesses or, if that technique failed, to testify himself.

Defendant would further have us find great significance in that he offered to stipulate into evidence all documents which the government possessed relevant to the indictment years. Frankly, we are not at all sure that defendant was serious and that this was not a grand stand play to the jury in that it was an attempt by him to put the government in the unfavorable light of having to produce witnesses from all parts of the country, at great expense to the taxpayers, merely in its attempt to oppress defendant. See Tr., vol. II, p. 312, line 25 - p. 313, line 16.

We say this because, as we observed in our opinion and order of December 29, 1960 (which order denied defendant's motion to review taxation of costs): "the timeliness of defendant's offer is subject to question. Although he had examined the bulk, if not all, of the government's documentary evidence prior to trial, defendant made no offer to stipulate at that time." Then, too, bearing in mind that defendant was aware of the nature and identity of the documentary evidence to be used against him, how can counsel indicate that the offer to stipulate was indicative

case was only concerned with the inadequate representation of a defendant by somebody, an attorney, other than himself. In that case, Lunce could find fault with an attorney; here, defendant can only find fault with himself.[9] In any event, the *Lunce* case

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of stupidity when we have not been cited to any document, other than those objected to by defendant at trial, which should not have been admitted? Finally, this Court saved defendant from himself, as it were, when it refused to coerce the government to accept the offer to stipulate. Tr., vol. II, p. 313, line 17 - p. 315, line 8.

The defendant next asserts that the instructions offered by him were wholly inadequate and that he did not object to instructions offered by the government. To begin with, the proffered instructions indicate that either defendant has legal ability far beyond that of the average layman, or else that counsel retained by him for that special purpose did not do him justice. We say this because the instructions were submitted in the style prescribed by the Local Rules of this Court and complete to the point of bearing citations to cases. With respect to the lack of objection to the government's proposals, we note that they were, in the main, accurate statements of the law, but that in the interest of doing justice to the defendant this Court labored long and hard to scrutinze carefully and to edit or to rewrite any of the government's instructions which did not give defendant his due. Finally, we would note that the true test of defendant's intelligence and alertness is whether he objected to the instructions which were ultimately proposed by this Court. In all humility we say that he could not, for the final instructions were, as we said earlier, a complete, fair and accurate statement of the applicable law.

Finally, this Court was able to observe the many other ways in which defendant demonstrated his intelligence and alertness. Whether we consider important matters such as his demand for a bill of particulars or relatively unimportant ones such as calling attention to the fact that a given document was dated incorrectly. Tr., vol. I, p. 253, line 25 - p. 254, line 11, and calling to the attention of government counsel the correct number of an exhibit. Tr., vol. IV, p. 1109, lines 18-22, the record shows that the defendant was constantly alert to protect his rights.

[9]The *Lunce* case is further distinguishable in that counsel there was not retained until the very day of the trial, 244 F.2d at 109; he represented that defendant without any preparation, 244 F.2d at 110; and he cannot be said to have been the choice of that defendant, since the trial date was at hand, the defendant had no counsel and the allegedly incompetent attorney volunteered at the very last minute. 244 F.2d at 109.

states a minority proposition, as is evidenced by a reading of the following cases: *Ex parte Haumesch*, 82 F.2d 558, 558-59 (9th Cir., 1936) (the defendant, "having been represented at the trial of his case . . . by an attorney of his own selection, cannot complain that he has been deprived of his constitutional right to be represented by counsel because the attorney so selected was, as he claims, unskillful or incompetent in the handling of the case."); *Gambill v. United States*, 276 F.2d 180, 181 (6th Cir., 1960) ("A defendant cannot seemingly acquiesce in his attorney's defense and after the trial has resulted adversely to him obtain a new trial because of the incompetency of his attorney."); *United States v. Hack*, 205 F.2d 723, 727 (7th Cir., 1953), cert. den. 346 U.S. 875 (1953); *United States ex rel. Darcy v. Handy*, 203 F.2d 407, 426 (3rd Cir., 1953), cert den. sub. nom. *Maroney v. United States ex rel. Darcy*, 346 U.S. 865 (1953); *Burton v. United States*, 151 F.2d 17, 18-19 (D.C. Cir., 1945), cert. den 326 U.S. 789 (1945); *Tompsett v. State of Ohio*, 146 F.2d 95, 98 (6th Cir., 1944), cert. den. 324 U.S. 869 (1944); *United States v. Malfetti*, 125 F.Supp. 27, 29 (D. N.J., 1954).

Defendant has hit upon quite a scheme: waive counsel, take your chances with the jury, then if the jury disappoints you, merely point out that you are a poor substitute for a lawyer, thereby gaining another trial with the concomitant chance that you will find the one juror who will keep you from paying the penalty which the law exacts. If such a maneuver were allowed "there would seldom, if ever, be a final termination of criminal charges." See *United States*

v. Hack, supra, at 727. Some court other than this one will have to sanction such a subterfuge.

V. The Defendant Was Not Denied a Fair Trial by Virtue of Comments of the Court or Government Counsel.

A. Allegedly prejudicial comments of the Court.

The defendant has gone to great lengths to cite those portions of the transcript which, he asserts, show that the Court, by its comments, prejudiced the defendant in the eyes of the jury. Before considering the specific items in question, we would only note that there never was, at any time, an intent on the part of the Court to do anything which would be calculated to harm the defendant. As this opinion has indicated already, and as we shall demonstrate shortly, the Court bent over backwards to see to it that the defendant received a fair trial.

First of all, a reading of the transcript will show that many of the allegedly improper comments of the Court were made in an attempt to remind the defendant that while examining a witness or arguing to the jury, he was acting in the capacity of an attorney. Time and time again, however, the defendant insisted on making remarks from the counsel table which, under no stretch of the imagination, could be regarded as being anything other than pure testimony on his part or, alternatively, as blatant arguing with the witness.[10] It was, of course, entirely proper for

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[10]The parenthetical notation at the beginning of each of the following paragraphs refers to the page and line of defendant's memorandum which cites allegedly improper comment of the Court. We shall deal with each such citation briefly.

A. (Page 14, lines 10, 11). The witness in question had twice stated that defendant had offered to make the loan in question.

the Court to caution or to reprimand the defendant lest he continue to lapse from the role of counsel into

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Tr., vol. III, p. 792, lines 21, 24. When defendant under the guise of cross-examination, stated: "Well, you know very well I didn't offer . . ." Tr., vol. III, p. 792, line 25, the Court properly concluded that the defendant was being argumentative. Tr., vol. III, p. 793, line 1. Defendant proceeded, without hesitation, to ask: "It was you who sought the loan?" He would characterize this only as being a leading question. We believed then, and say now, that in view of the fact the witness had answered the question twice, the defendant was being argumentative, and hence it was proper for the Court to interrupt him.

B. (Page 14, line 14). Defendant by referring to remarks out of context, attempts to make it appear that the Court was interrupting the defendant as soon as he started questioning a witness. The transcript, when read in context, shows that the defendant had just argued with the witness, Tr., vol. III, p. 795, lines 20-21, and that the Court was trying to explain that he must follow proper procedure. In the midst of the Court's comment, later resumed, the defendant simply began his questioning again. Tr., vol. III, p. 796, line 6.

C. (Page 14, lines 15, 16). These two comments merely drew the defendant's attention to the fact that all along he had been testifying under the guise of cross-examination, a fact which is borne out by the transcript of this particular witness' testimony. Tr., vol. IV, p. 872, lines 5-9; p. 873, lines 3-7; p. 874, lines 16-17; p. 875, lines 1-15.

D. (Page 14, lines 27, 28). The defendant was, again, testifying; hence, the Court's comments were perfectly proper.

E. (Page 14, line 29). The Court's comment referred to the following statement of defendant after the witness' answer: "Plus the cost of the property." Although the transcript shows that a question mark followed the quoted words, the Court's remark in question clearly shows that the Court interpreted defendant's words to be a statement of fact, rather than a question. This assignment of error points up the danger of trying to gain knowledge as to the way things are spoken, from the cold, printed record. Once the Court had determined that the defendant was again testifying, it was perfectly proper to go on to remark that the defendant's statement should be stricken.

F. (Page 14, lines 31, 32). The defendant was in the process of cross-examination. His purported questions were obviously attempts to testify. Under the circumstances, the Court's cautions were proper.

G. (Page 15, line 1). Another example of defendant's testifying. Here, he explains that he merely wanted to "refresh her memory as to what [the] agreement was" between the witness and defendant. But, as the Court pointed out, the witness had already explained that. See Tr., vol. V, p. 1211, lines 7-10.

that of witness. See *Shelton v. United States*, 205 F.2d 806, 810 (5th Cir., 1953), cert. dismissed 346

H. (Page 15, line 2). The defendant had laid absolutely no foundation upon which to base a question as to the witness' knowledge of the event in question. Under the circumstances, the remarks of defendant were simple testimony.

I. (Page 15, lines 3, 4). Both of defendant's questions amounted to testimony and, in any event, at least the second question, at Tr., vol. V, p. 1282, lines 10-12, called for an opinion which the witness could not possibly give. See the witness' own disclaimer of knowledge at Tr., vol. V, p. 1281, lines 18-20.

J. (Page 15, line 8). Defendant's statement "in fact, I had quit financing Morvay" is clearly an attempt to testify.

K. (Page 15, line 14). Defendant had asked the witness whether certain statements were contradictory. The question, as phrased by defendant, indicates that the witness made the contradictory statements, whereas the record, Tr., vol. V, p. 1389, line 24 - p. 1390, line 2, shows that the statements were made by defendant to the witness. Right after the witness agreed that the statements were contradictory, defendant attempted to explain matter which is not apparent from the record, but which under any circumstances must be classified as testimony or argument. The Court then merely advised defendant as to when it would be proper to contradict the witness.

L. (Page 15, line 16). The witness had just finished giving his version of the nature of a complicated transaction. As soon as he was finished, the defendant asserted: "No, that was not the agreement." Tr., vol. VI, p. 1559, line 15. Under the circumstances, it was appropriate again to advise defendant of the proper manner to contradict witnesses.

M. (Page 15, line 18). The five-line "question", Tr., vol. VI, p. 1560, lines 17-21, was nothing other than testimony or argument, in which case it was proper for the Court to inquire of defendant whether he was arguing or questioning, and in any event, to remind him that he should ask a question.

N. (Page 15, line 19). The 11-line "question", Tr., vol. VI, p. 1562, lines 3-13, was nothing other than testimony or argument, in which case it was proper for the Court to advise defendant that it did not constitute cross-examination. The second question, eight lines long, Tr., vol. VI, lines 17-24, was part testimony, and in any event, so confusing that it was necessary, for the witness' understanding, for the defendant to break it down, as the Court directed.

O. (Page 15, line 20). The example used by defendant in his question was legitimate. But, when defendant concluded in his question "Now, there is a tax saving . . ." that is sheer testimony. Tr., vol. VI, p. 1563, line 9.

P. (Page 15, lines 22, 23). The witness had stated, Tr., vol. VI, p. 1565, line 12, that defendant had made an additional loan

U.S. 892 (1953). The defendant objects that the Court found it necessary to remind the defendant that if he desired to testify that he should take the witness stand. This argument is adequately and appropriately answered by the following observation by the Court of Appeals for the Fifth Circuit:

> "The trial court would not conceivably have tolerated the self-serving statements made by the accused and his flat denials of statements made by witnesses, and his irrelevant comments, if made by a lawyer. In fact, the criticism now levelled at the trial court for referring to the right of the

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to a third party. The defendant soon thereafter went on to "ask" whether the witness recalled that the defendant refused to make an additional loan, but was willing to buy the properties in question for a specific sum of money, and then give the third party the difference between the value of the original loan and the purchase price of the properties. Tr., vol. VI, p. 1566, lines 18-22. The Court cautioned defendant, but with complete disregard for what the Court had just said, the defendant continued. "Do you remember *that?*" Tr., vol. VI, p. 1566, line 25.

Q. (Page 15, line 24). The witness had testified that a third party had *gone* to defendant to borrow. Tr., vol. VI, p. 1569, lines 1-2, whereupon the defendant gratuitously commented: "They *did* borrow additional funds." Tr., vol. VI, p. 1569, line 3. The Court again advised defendant that he was testifying.

R. (Page 16, line 3). The defendant had been attempting to push the witness into saying that there would be "double-taxation" if the defendant had been required to pay certain taxes. On three occasions the witness testified that no "double tax" was involved. See Tr., vol. VII, p. 1743, lines 10-14; p. 1750, lines 1-2, 23-24. The defendant proceeded to argue with the witness, who had just stated that the corporation in question had not paid a tax, by asserting: "Because no tax was due." Tr., vol. VII, p. 1751, line 12. The allegedly objectionable colloquy between Court and defendant was merely an attempt to ascertain whether or not the defendant intended to examine or to testify.

S. (Page 16, line 19). The defendant attempted to relate a conversation which had taken place outside of the courtroom. A check of the transcript shows that the particular conversation had never been testified to by the witness. But, defendant was not deterred, because immediately after the Court had cautioned him, he proceeded to relate more of the conversation. Tr., vol. VII, p. 2014, line 25 - p. 2015, line 2.

> accused to testify in his own behalf arose entirely from the court's patient explanation, repeatedly made to Smith as he purported to cross examine government witnesses, that he could not argue with them or dispute them, as he repeatedly did, but that if he wanted to get his views to the jury he ought to take the witness stand. There is no merit in the contention that the court prejudiced appellant by any of such statements or by all of them taken together." *Smith v. United States*, 234 F.2d 385, 388-89 (5th Cir., 1956).

Secondly, despite the great number of cautions by the Court, the defendant often was not satisfied with merely arguing with the witnesses. He saw fit on several occasions to comment on the credibility of the witnesses during the course of his examination,[11] a

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[11]The parenthetical notation at the beginning of each of the following paragraphs refers to the page and line of defendant's memorandum which cites allegedly improper comment of the Court. We shall deal with each such citation briefly.

A. (Page 15, lines 9, 10). On three different occasions the defendant had commented on the credibility of the witness in question. Tr., vol. V, p. 1379, line 11 ("Well, you have proved yourself an astute man."). The Court ordered the remark stricken. The defendant, without hesitation, proceeded to say: "Well, you have proved very clever in . . . ." Tr., vol. V, p. 1379, line 16. The same order was given, whereupon the defendant commented: "It seems that the witness should be able to remember as to—his memory has been good as to most subjects, and it seems that he should be able to remember as to the time. . . ." Tr., vol. V, p. 1379, lines 18-21.

B. (Page 15, line 11). The defendant asked the witness whether he had failed to accede to the defendant's request for an itemization. Tr., vol. V, p. 1383, lines 5-6. The Court observed that "there is nothing in the record that you made a request for an itemization. The witness has stated you didn't." This comment was well warranted by the testimony. See Tr., vol. V, p. 1381, line 18 - p. 1382, line 9. Almost immediately thereafter, the witness stated: "I don't recall any conversation with you in which you made such a request." Tr., vol. V, p. 1383, lines 16-17. In response to that statement, the defendant observed: "Your mem-

tactic which no court need tolerate. Upon the occasions cited in paragraphs A and C in footnote number 11, the Court found it necessary to threaten to hold

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ory seems very good . . . ." Tr., vol. V, p. 1383, line 18. The Court proceeded to caution defendant not to make remarks concerning credibility. The defendant, with an innocence reserved only to angels retorted: "I am simply trying to bring out the complete and true facts." Tr., vol. V, p. 1384, lines 5-6. The Court then cautioned: "You do it according to the rules of procedure and evidence. Just because you want to be your own attorney, that doesn't mean that the bars of procedure are down and you can conduct this like you would a Piute pow-wow." On seven previous occasions the defendant had commented on credibility. See Tr., vol. III, p. 784, lines 14-15 ("Your Honor, I have never heard such a portrayal . . . ."); vol. IV, p. 988, lines 13-17 ("and then gets on the stand and testifies as he did, which he knows to be just the reverse of the truth."); vol. IV, p. 988, lines 20-21 ("When he perjures himself that way, I think . . . ."); vol. V, p. 1379, lines 11, 16, 18-21, and p. 1383, line 18. These circumstances explain why the Court felt a strong admonition was appropriate. As to the reference to a Piute pow-wow, we would only note that the expression is a colloquialism common to citizens of this State, and that it has, and was only intended by the Court to have reference to an informal and not too well organized method of conducting important business. It is similar to referring to that type of gathering which is characteristic of a town meeting, a symbolism which this Court used on another occasion. Tr., vol. VII, p. 1676, lines 13-18.

C. (Page 15, lines 30, 31). The witness in question had just testified that the money from certain accounts had all gone either to the defendant directly or to one of his various accounts. The defendant observed: "That is not a true picture." Tr., vol. VII, p. 1690, line 21. In light of prior admonitions, the defendant must be assumed to have realized that he was acting wholly outside his role as attorney.

D. (Page 16, lines 20, 21). Here, the defendant stated in his argument that he had not received any interest payments from the witness in question. Tr., vol. VIII, p. 2016, line 21. The fact is that the witness had testified exactly to the contrary. See Tr., vol. V, p. 1201, line 13 - p. 1202, line 8; p. 1208, lines 9-11. The defendant was not satisfied, so he attempted to contradict her. Tr., vol. VIII, p. 2016, lines 21-24. The Court merely tried to point out that the defendant would not be allowed to do so. However, since the defendant had seen fit to use his argument to impeach the witness, the Court thought then, and states now, that it was proper to caution the jury that, as far as the law was concerned, the witness' testimony stood unimpeached. Tr., vol. VIII, p. 2016, lines 7-10.

defendant in contempt. By the time the trial had reached those respective stages, the defendant had repeatedly violated the cautions, admonitions and directions of the Court, not only with respect to the making of disparaging remarks about the testimony of various witnesses, but also by testifying and arguing under the guise of cross-examination and by asking improper questions. The defendant is an intelligent man, and so it occurred to the Court then, as it does now, that defendant's conduct, in the face of the scores of warnings given by the Court, may well have been a deliberate attempt on the part of defendant either to make a play for the undeserved sympathy of the jury, or to antagonize the Court to the point where it would be pushed into making unjudicious comments. The Court was determined to relieve defendant of his misconceptions; there would be respect for the Court. Hence, in the only language that the Court felt that the defendant would understand, the Court threatened to hold defendant in contempt and advised him that had he been an attorney he already would have been so adjudged and sentenced.[12] We shall have occasion later to comment generally

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[12]In addition to the instances already referred to, there was one other time when the Court alluded to contempt. At that time the defendant saw fit to testify in the form of a five-line "question." Tr., vol. VII, p. 1693, lines 4-9. The government objected, but the Court allowed the question to stand. This, of course, was out of the desperation induced by the defendant's consistent attempt to testify from the counsel table. However, the Court was disinclined to allow defendant to make a complete shambles of the rules of court, hence remarked: "Don't take that as an invitation, Mr. Redfield, because the Court will do what it promised if you aren't careful. I have reached the end of my patience." In light of all that had transpired previously, the Court felt then, and holds now, that the comment was fully justified.

upon the alleged prejudice of the Court, but, in the meantime, we are of the firm opinion that, under the circumstances, it was entirely proper for the Court to speak as it did. See *Abbott v. United States,* 239 F.2d 310, 315 (5th Cir., 1956) (even imposing a fine in the presence of the jury is warranted); *People v. Knocke,* 94 Cal.App. 55, 270 Pac. 468, 471 (1928). (Because of the repetition of the offense, the appellate court sanctioned the following remark of the Court to the defendant: "If there is any more of that kind of talk, you will be in jail over Saturday and Sunday for contempt of court.").

The third category into which the assignments of alleged error fall relate to those incidents when the defendant asked a question in an improper manner—improper either because it asked for an opinion the witness was wholly unqualified to give, or because the question was confusing.[13] It needs no citation of authority for this Court to observe that such questions are not permitted. Accordingly, it was proper for the Court to caution the defendant.

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[13]The parenthetical notation at the beginning of each of the following paragraphs refers to the page and line of defendant's memorandum which cites allegedly improper comment of the Court. We shall deal with each citation briefly.

A. (Page 14, lines 25 to 26; p. 15, line 5). The defendant's question obviously called for an opinion well beyond the competency of the witnesses in question. In any event, the questions were asked during cross-examination, where it is elementary that the examiner cannot go into reputation. Finally, the questions, going as they did to reputation, were objectionable because of improper form.

B. (Page 14, line 30). The defendant has asked a question as to his reputation in improper form. The Court merely stated that the question was objectionable and the reasons why. The Court allowed the question to stand, however, and after the witness stated his answer, the Court merely asked the witness how

The fourth problem deals with that portion of defendant's argument which related to the alleged burglary of his home. It began when, after "testifying" in his argument that he had made more money in 1932 than at any other time in his life, he stated: "During the noon hour of February 29, 1952, my home was burglarized." p. 1973, lines 18-19.

Immediately government counsel objected: "If the Court please, I do not believe that the remarks of counsel [quoted above] are in evidence. I feel that he is going far afield from drawing any inferences from the evidence, but, rather, at this time is testifying." p. 1973, lines 20-23.

As we were advised by defendant's February 21, 1961 memorandum in support of the instant motion,

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he came by the information which he had related. This, of course, was proper since defendant had failed to lay a proper foundation.

C. (Page 15, line 12). The first question, Tr., vol. V, p. 1386, lines 1-5, was thoroughly unintelligible, hence the Court merely asked the defendant to make it more succinct. The second question, Tr., vol. V, p. 1386, lines 12-17, clearly asked the witness for an opinion he was not competent to give. The Court inquired whether a proper foundation had been laid. That one had not been laid becomes all the more clear when the witness later testified that he was not an expert on income tax law. Tr., vol. V, p. 1387, lines 3-5.

D. (Page 15, line 13). The question was clearly an attempt to ask the witness for an opinion which he could not possibly have given. Tr., vol. V, p. 1390, lines 5-6. The defendant then asserted that the witness had made a given statement. Tr., vol. V, p. 1390, lines 13-14. The Court quite properly observed that the witness had made an exactly contrary statement, which appears at Tr., vol. V, p. 1389, lines 17-20. Under the circumstances, the reprimand of defendant would seem fitting and proper.

E. (Page 15, line 21). The question was difficult to understand in that it compounded two distinct thoughts. Tr., vol. VI, p. 1563, line 22 - p. 1564, line 1. The Court merely inquired of the witness whether he understood, something undeniably proper.

there had been two references to the burglary by witnesses.[14] Under the circumstances, however, it was quite understandable that government counsel, the Court, and, we assume, the defendant, had overlooked them.[15]

In all of the colloquy between the Court and the defendant following the government's objection, never once did the defendant, in precise and intelligible terms, call the Court's attention to the fact that there

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[14]Mr. Hogan stated in passing: ". . . he told us, that there had been a robbery that had taken place, and some of our dividend checks were alleged to have been stolen in the robbery." Tr., vol. IV p. 1027, lines 13-16.

Mr. Hoffenblum had been asked whether he had found any indication that securities were sold by defendant during 1958. He responded that about $45,000.00 worth had been sold at a cost of about $30,000.00. The government counsel then asked: "All right. Will you continue?" Tr., vol. V, p. 1364, lines 16-21. The witness then explained part of the Reno Brewing Co. transaction and why defendant had not reported certain Canadian dividends. Tr., vol. V, p. 1364, line 22 - p. 1365, line 17. He then went on to say: "He stated that he had complete records of all his transactions dating back to 1952, at which time his home was robbed and he said that his records were taken at that time during the robbery. That was the gist of the conversation." Tr. vol. V, p. 1365, lines 18-21.

[15]That the references by the witnesses went unnoticed likely explained by the following facts. 1) Both were passing and hearsay in character, and were not responsive to the questions asked by examining counsel. 2) Nothing was made of them at the time either by the government or by the defendant in his cross-examination. 3) The trial had been a long one—the better part of four weeks long. 4) The government had brought to the witness stand some 89 witnesses, and the defendant had produced 10 in addition. 5) The testimony alone covered some 1,713 pages of transcript. 6) The Hogan statement was made on October 13, the Hoffenblum statement was made on October 18, but the defendant's argument was not until October 27.

This Court is of the opinion that the foregoing facts demonstrate how easy it was to overlook the references to the burglary and that, at the same time, they dispel the insinuation of the defendant that the Court engaged in a calculated attempt to deprive the defendant of his due.

had been references in the testimony upon which to base his remarks. His failure to correct the Court, so that it might at that time have taken preventative steps, was, we feel, a waiver of the alleged error, if any. See *MacInnis v. United States,* 191 F.2d 157, 159 (9th Cir., 1951), cert. den. 342 U.S. 953 (1952); *United States v. Vasen,* 222 F.2d 3, 6 (7th Cir., 1955), cert. den. 350 U.S. 834 (1955); *Smith v. United States,* 216 F.2d 724, 727 (5th Cir., 1954).

In any event, we feel that there was no error in the first instance. This is because, even assuming that at the time of the incident the Court had been aware of the prior testimony, the defendant could not, under the circumstances, properly have stated more in his argument than he did.

The defendant did observe, during his argument, that his home had been burglarized, Tr., vol., VIII, p. 1973, lines 18-19; p. 2001, lines 23-24, and that "my records were lost to me." Tr., vol. VIII, p. 2001, lines 23-24, p. 2002, line 5. Bearing in mind the exact nature of the hearsay comments of the two witnesses in question, one familiar with this trial and the issues and evidence therein would have to conclude that what the defendant likely would desire to argue would be that the jury should draw the inference that the facts of burglary and the stealing of certain records accounted for his misstatement of the cost basis of the securities which he sold and which were the subject of the indictment.[16]

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[16]Our assumption is supported by the following remonstrance made by the defendant during the course of colloquy between the Court and the defendant at the time of defendant's argument to

But in no event could defendant be allowed to argue in that manner. This is because if, in fact there had been a burglary, it would not be material to the case, unless there was proof that the burglary resulted in loss of records which pertained to the stock transactions under inquiry. (1) There was no evidence whatever as to whether all his records, if any, were stolen, or part of them only. (2) There was absolutely no evidence that the records which allegedly were stolen related to the particular stock transactions in question. (3) The defendant had failed to show by testimony or otherwise that he had ever kept a record concerning the particular stock transactions which were the subject of the indictment. (4) The defendant had never introduced evidence to show that he had ever made a good-faith attempt to learn of the price at which he had purchased the securities in question. Because of the glaring lack of vital evidence, the jury could never be allowed to infer that the burglary and the stealing of certain records, if any, accounted for his misstatement of the cost basis. Accordingly, the defendant would never be permitted, under the circumstances of the record, to so argue.

Fifthly, the defendant cites us to miscellaneous colloquies between the Court and defendant. As the notation in the margin shows,[17] these comments were

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the jury: "Well, the counsel for the plaintiff has made a point, or tried to make a point, that I had not showed [sic] exact costs in some instances of securities sold." Tr., vol. VIII, p. 1978, lines 13-15.

[17]The parenthetical notation at the beginning of each of the following paragraphs refers to the page and line of defendant's memorandum which cites allegedly improper comment of the Court. We shall deal with each such citation briefly.

harmless, when read in context, and in any event, were nothing other than an attempt by the Court to

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A. (Page 15, line 8; Page 8, lines 10-18). At the beginning of his opening statement to the jury, the defendant stated: "I, of course, am not an attorney. I know absolutely nothing about the law." Tr., vol. I, p. 145, lines 9-10. He went on to observe: "Yes, and I don't feel that I need to know the law. Those who know the law may have an advantage over me, in that they might know something to do or something to say—shall we say tricks of the trade, that might . . . ." Tr., vol. I, p. 145, lines 16-19. Later on, while cross-examining a government witness, he apparently did not like the witness' answer that he, the witness, had paid a certain tax. So, he said: "That stops me, your Honor. That stumps me. • • • • I paid it." Tr., vol. III, p. 798, lines 7-21. Both instances, as they appeared in the context of the trial setting, were nothing other than attempts on the part of defendant to gain undeserved sympathy of the jury. The Court felt that it was necessary to set the record straight, as it were, so that the jury would not fear that defendant's lack of representation by counsel would result in his getting an unfair trial. After all, the defendant had determined to appear *pro se*. Since the decision was a voluntary one on his part, there was no reason to permit him to make a play for the jury. He was doing just that when, with his hands in the air and a look of chagrin on his face, he allowed as how he did not know how to handle the situation brought about by the witness' unfavorable answer. The Court's comment "I don't propose to have you impose on the jury by standing there hour after hour indicating how stupid you are or at what a loss you are at defending your own case. You had the right to have counsel. Now you chose not to have. Having chosen to represent yourself, you must assume the difficulties and the hazards, but don't weep. It was a voluntary choice on your part," was, in light of defendant's conduct, entirely proper. See in this connection, *Butler v. United States*, 191 F.2d 433, 436 (4th Cir., 1951), where the trial judge said: "but if you are not sufficiently informed as to how to try a case in this Court you will not be allowed to try it," and the Court of Appeals, in affirming the conviction, stated: "This statement was proper in view of the conduct of counsel for defense. Attorneys have an affirmative duty to conduct themselves properly before the courts. Where counsel persists in obnoxious actions, the court must be free to warn them of any such improprieties." See also *People v. Knocke*, 94 Cal.App. 55, 270 Pac. 468, 470 (1928), where the appellate court affirmed, even though the trial court had said: "I am surprised that any one who has gotten by the Bar Association examination should raise that question," and "if you cannot behave yourself in this court, you better go and practice in the police court." *c.f., People v. Schneider*, 3 Cal. App.2d 1, 39 P.2d 258, 259-60 (1934), where there was affirm-

induce the defendant to observe proper courtroom decorum.

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ance even though, after defendant stated that he would appear *pro se*, the trial court said: "You have more nerve than I have."

B. (Page 15, line 15). The cold record does not show why the Court spoke as it did. However, the Court now recalls that at the time of the incident, the defendant, by tone of voice and demeanor, was doing nothing other than "grandstanding." Indeed, this conclusion is supported by the subsequent revelation of defendant that his offer had an ulterior motive, namely, the convenience of his own witnesses. In any event, the defendant's demeanor was typical of his coy remarks which can only be described as fawning in nature. See Tr., vol. VIII, p. 1841, lines 13-18 (reference, when speaking to the Court, to "I love you.").

C. (Page 15, lines 25-27). The witness in question had originally been called as a government witness on October 11, 1960. During the course of defendant's cross-examination, there was a question as to whether the witness had a certain tax receipt. At that time, the Court ordered the witness to bring the item to court. Tr., vol. III, p. 799, line 16. The record shows that on October 21, 1960, the witness was produced as a witness on behalf of the defendant. Tr., vol. VI, p. 1604, lines 8-10. The allegedly improper remarks addressed to defendant were occasioned by the fact that although, by his own admission, Tr., vol. VI, p. 1611, lines 14-25, the defendant had himself found the item in question the very night of the Court's order to the witness, the defendant waited ten days to advise the Court of such fact, thereby sending the witness, with the sanction of the Court, on a wild goose chase. The reprimand, Tr., vol. VI, p. 1612, lines 6-11, 14-18, 22-23, was entirely proper, and, if anything, should have been stronger. This particular instance of the defendant's lack of respect for the Court has nothing at all to do with the defendant's attempt to impeach a government witness.

D. (Page 15, lines 28-29). Initially, it will be observed that at this particular stage of the trial, the witness had already become a witness for the defendant. Tr., vol. VI, p. 1604, lines 8-10. The dispute in question was who, the witness or the defendant, had paid a certain tax, and who supplied the funds for the payment. The Court observed that there was no question but that defendant had paid money to the Internal Revenue Service. (He does not complain about that comment.) But, that was not the same thing as saying that, as the defendant would have had us believe, that it was the defendant's money. In line with the well-established proposition that a federal judge may comment on the evidence already adduced, the Court merely commented that the fact that the defendant paid money to Internal Revenue did not "wipe out this witness' testimony, as I have listened to it. His position is that he may have paid you the amount of money."

Finally, the defendant asserts the related points that, on the one hand, the Court "continuously inter-

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Tr., vol. VI, p. 1614, lines 7-9. This comment of the Court was amply supported by the witness' prior testimony, which appeared at Tr., vol. VI, p. 1607, lines 17-19. There was therefore, no attempt to "improperly underwrite the credibility of a witness for the plaintiff."

E. (Page 16, line 1). In this instance, the government was attempting to introduce into evidence the original ledger of a witness who had previously been called in behalf of the defendant. The defendant objected to its admission on the ground that a government agent was familiar with its contents and that it "just seems asinine to me to deprive the McCues . . . ." Tr., vol. VII, p. 1713, lines 8-13. The Court, with a calmness not justified by defendant's conduct, merely stated: "You will have to change your vocabulary if you are going to be a lawyer. You don't intimate that anyone is asinine in court." Tr., vol. VII, p. 1713, lines 14-16. What is prejudicial about that?

F. (Page 16, line 2). In this instance the government had just completed a thorough examination of a witness. The witness was excused, and the Court asked the defendant whether he then wished to resume his cross-examination of another witness, the government's expert. The defendant, with a dismaying obliviousness to the Court's question, and with obvious reference to the government's just concluded examination, said: "I hope I can take lessons from counsel and learn to say so much about nothing." Tr., vol. VII, p. 1735, lines 10-11. The Court, refusing to let go unchallenged the defendant's uncalled for slur upon the able United States Attorney, simply responded in kind. Actually, the defendant should have been cited for contempt.

G. (Page 16, lines 22, 23). We join together these two allegations of error, for they show the nature of some of the defendant's thoroughly uncalled for remarks. On one occasion the defendant stated during the course of his argument to the jury: "but counsel yesterday would make an issue of that to show how small I was—not half as small as the men I have told you about, the little men in big places in Government." Tr., vol. VIII, p. 2020, lines 11-14. Of course, the defendant could have been referring to anybody from the President to government counsel, or from Internal Revenue agents to the Court itself. The Court merely said: "Well, let's just define that a little further, because, as the Court has pointed out, the Court is making a record also. Now, who do you mean by the 'little men in big places?'" Tr., vol. VIII, p. 2020, lines 15-18. The second of defendant's remarks came shortly thereafter. He observed that certain Internal Revenue agents "are even a discredit to themselves." Tr., vol. VIII, p. 2021, lines 17-18. The Court merely observed that it had already cautioned defendant not to make remarks disparaging the

rupted and belittled" the defendant "even though no objection had been interposed by two able and experienced Trial Counsel representing the plaintiff," and, on the other hand, that counsel for the government "were accorded every courtesy and consideration by the Court." In the first place, as we have suggested already and as we shall go on to discuss presently, the Court did not caution or reprimand the defendant except on those occasions when he was fully deserving of such. Secondly, there is nothing at all to show that the Court "belittled" the defendant. Thirdly, although the record is incapable of showing it, the occasions were many when the government counsel were on their feet, ready to make an objection which was never stated. When the misconduct of defendant was so obvious, there would have been little reason for the Court to delay its ruling until the government fully stated its position. In any event, the defendant's conduct, carried on as it was in the face of repeated explanations, cautions and reprimands of the Court, constituted nothing other than a challenge to the authority of the Court itself. Under such circumstances, we see no reason at all why the Court had to wait for objection by the government. Fourthly, as the notation in the margin indicates, there were innumerable times when the Court allowed defendant to

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character of anyone. At this time, the Court refuses to further dignify the two incidents by making additional comment.

II. (Page 16, line 24). The defendant had seen fit to inject into his argument to the jury a supposedly humorous story which we assume had no basis in fact. Whether it did or not, the fact is that the defendant was attempting to ridicule or poke fun at government agents, a device which would not be tolerated.

proceed, without reprimand, although he was violating rules of evidence, procedure, or the Court.[18]

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[18]The following citations to the transcript are by no means to be thought of as exhausting the instances where the Court refrained from compelling defendant to comply with the ordinary rules of evidence or of Court.

Vol. III: Page 829, line 24 - p. 830, line 5.

Vol. IV: Page 878, lines 4-12, 14-19; p. 892, lines 11-18; p. 1113, lines 9-15.

Vol. VI: Page 1590, lines 2-7; p. 1604, line 23 - p. 1605, line 14; p. 1631, lines 18-21; p. 1649, lines 6-8.

Vol. VII: Page 1694, line 25 - p. 1695, line 9; p. 1701, line 25; p. 1704, lines 20-23; p. 1715, lines 8-15.

Vol. VIII: Page 1970, line 16 - p. 1971, line 8 ("Counsel for the Government put on quite a show yesterday. Mr. Maxwell, the performer, reminded me of an incident in my childhood. You ladies and gentlemen, of course, know what a chameleon is, a lowly lizard-type animal, which can change color at will. •••• You could pick it up and place it with its surroundings, and it would immediately change color and blend with the surroundings. Just so was Mr. Maxwell's testimony yesterday. [Note: Mr. Maxwell never testified]. He tried to make you believe that black was white; that white was black."); p. 1972, line 21 - p. 1973, line 17 during his argument, defendant related that he had moved from California, and why, and that he was making a fortune during the depression); p. 1935, lines 21-22 ("Counsel was wrong again. I do not propose to ever cash those checks."); p. 1987, lines 1-12 (comment, during argument, as to how three Presidents had permitted the public debt to increase); p. 1990, lines 6-7 (testifying in argument: "I do know that I did not receive any of it."); p. 1993, lines 7-13 ("The large exhibit 265, could just as well have been portrayed on an ordinary letter sized sheet of paper, but, no, that would not create quite the impression that the larger sized sheet would, and two, it would be too economical for those in charge of spending taxpayer's dollars, just as men brought from the four corners of this nation to put dividend checks in evidence. . . ."); p. 1994, lines 9-13 ("Now, that is what I refer to, ladies and gentlemen, when I say there is something wrong with those who hold the purse strings to spending of our taxpayers' dollars. The Canadian Government would never do such as that. That is the height of stupidity. It is a waste of money."); p. 1996, line 22 - p. 1997, line 1 ("For some reason or other the Internal Revenue Service has not approved a single tax return filed since the date of my robbery in 1952 although they had always approved settlements up to that date. Maybe the agent who has sat here all through the trial with a smirk on his face could give you the answer."); p. 1998, line 25 - p. 1999, line 3 ("Well, you know, she was ob-

Nor, is there any merit to the allegation that the Court showed favoritism to the government counsel. The fact is, of course, that they presented their case in a generally unreproachable fashion. However, as the notation in the margin shows, there were many government-fostered objections which were overruled, and when government counsel made an objectionable remark in his argument, the Court was quick to correct the record and admonish the jury carefully.[19]

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viously disturbed here and, I don't know, maybe it is because she has reached the ripe old age of thirty-one and has never known the thrill of holding hands with one of the opposite sex."); p. 2010, line 16 - p. 2011, line 4 ("You know, only last night I received a telephone call from a man who told me of many incidents he knew of where the Government agents had intimidated people to make them pay taxes they did not owe, and of cases where refunds were due the taxpayer, but refused by the Government, because the Government knew full well that it would cost these persons more to obtain it than would be represented by the refund."); p. 2012, lines 7-11 ("Well, counsel for the Government must think you jurors stupid and cannot see through their unsavory tactics. They will discover that you are intelligent and alert and capable of seeing through the smoke screen they unceasingly try to lay before you."); p. 2024, lines 10-13 ("Our counsel for the Government yesterday—which I liken to a chameleon—tried to change the color, distort and color things differently than they exist, in an effort to influence this jury."); p. 2024, line 16 - p. 2025, line 23 (reads newspaper article that attempts to make a mockery of tax system.).

[19]The following citations to the transcript are by no means to be thought of as exhausting the instances where the Court either gave rulings unfavorable to the government or otherwise made comments adverse to government counsel.

Tr., vol. I, p. 72, line 20 - p. 73, line 5; Tr., vol. II, p. 415, lines 11-12; Tr., vol. II, p. 552, lines 20-21 ("Well, counsel, isn't that in effect carrying coals to Newcastle?"); Tr., vol. III, p. 788, lines 19-20 (objection overruled); Tr., vol. III, p. 830, lines 2-5 (same); Tr., vol. IV, p. 878, lines 17-19 (same); Tr., vol. IV, p. 890, lines 1-5 (same); Tr., vol. IV, p. 898, lines 24-25 ("Now, that may satisfy you, counsel, but I would like to have a date on that."); Tr., vol. IV, p. 961, lines 10-14 (objection overruled); Tr., vol. IV, p. 1113, lines 12-15 (same); Tr., vol. V, p. 1284, lines 11-14 (same); Tr., vol. VI, p. 1575, lines 2-5 (same); Tr., vol. VI, p. 1583, lines 1-2 (same); Tr., vol. VI, p. 1590, line

Before stating a few of the general principles of law which we believe are appropriate to this general problem, we will note initially that the fact that the attack is leveled on the Court, however much the Court would prefer not to pass upon the issues, does not relieve the Court of the duty to do so; otherwise, the granting of the motion for new trial under such circumstances would be automatic and remove discretion from the Court. As we pointed out at the beginning of this opinion, such is not the rule.

Although defendant has labored mightily to point out the alleged indiscretions of the Court, we think it important to observe that the "questions and comments of the court must be read in their context and viewed with a perspective of the whole proceedings." *Ochoa v. United States*, 167 F.2d 341, 344 (9th Cir., 1948); *Todorow v. United States*, 173 F.2d 439, 448 (9th Cir., 1949), cert. den. 337 U.S. 925 (1949); *United States v. Thayer*, 209 F.2d 534, 536 (7th Cir., 1954) ("Words of the trial judge are not to be isolated for assessment. [citing the *Ochoa* case, *supra*]. Nor are specimens of his comments to be wrested out of context and measured against those intriguing generalities cited to us from various cases by defendant. While there is no single formula for guaging judicial discretion such contentions as raised by this defendant

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6-7 (same); Tr., vol. VII, p. 1726, lines 16-19 ("Counsel, that isn't exactly the testimony of the witness."); Tr., vol. VII, p. 1927, lines 10-18 (admonition to jury to disregard remarks made by government counsel during his argument to jury); Tr., vol. VIII, p. 2010, line 23 - p. 2011, line 4 (refusal to order remarks of defendant stricken); Tr., vol. VIII, p. 2013, lines 14-16 (same).

must be resolved in an environment supplied by the full record."); *United States v. Warren,* 120 F.2d 211, 212 (2d Cir., 1941) (where Judge Learned Hand observed that "separate passages cut from their context and from the trial as a whole, often have an apparent importance which in fact they do not deserve); *United States v. Lee,* 107 F.2d 522, 529-30 (7th Cir., 1939), cert. den. 309 U.S. 659 (1939); *Goldstein v. United States,* 63 F.2d 609, 614 (8th Cir., 1933); *Hargrove v. United States,* 25 F.2d 258, 262 (8th Cir., 1928).

What, then, does the record show? Almost from the beginning, and certainly right up to the end, the defendant was, as we have already pointed out, engaged in a pattern of conduct that can only be described as contemptible. This, after all, was an intelligent defendant who had made a veritable fortune by use of his mind and cunning. It is inconceivable that he did not understand the repeated explanations, cautions and reprimands of the Court. Yet, time after time, after time, he proceeded to ignore the Court and to display an utter contempt for it. Nothing better illustrates defendant's approach than his demeanor during that part of the argument concerning the alleged burglary of his home.[20] It was not only the things the defend-

[20]The following colloquy begins at Tr., vol. VIII, p. 1974, line 21 and ends at p. 1975, line 19:

"The Court. There was no testimony, as I understand, concerning any fire [burglary] any place. If there is to be testimony, in fairness, the Government has the right to cross-examine, just the same as you had the right to cross-examine the Government witnesses. So, if you desire to bring in testimony of a fire [burglary] you should have done that through witnesses and the Government would have the right to cross-examine those witnesses. That was not done.

ant did or said; it was also the manner in which he did them. One minute he would listen to the Court, and then he would arrogantly do exactly that which he was told not to do. One minute he would grin either to the jury or to the Court in a supercilious manner, and the next he would engage in biting sarcasm. The printed page does not show this; but, nobody at the trial will deny that that is what the Court faced.

The patience of the Court was sorely tried. It did its level best to restrain itself and, at the same time, preserve a certain semblance of courtroom decorum. If, upon occasion, the Court did not "choose [its] diction with the nicety of a Field or Marshall," *People v. Knocke*, 94 Cal.App. 55, 270 Pac. 468, 471 (1928), we still "must not overlook the fact that the human element cannot be entirely eliminated from the trial of lawsuits." *Goldstein v. United States*, supra, at 613. We doubt that but very few judges have such thick hides that they can relegate themselves to the status of automatons. Nor should they.

"Mr. Redfield. Well, your Honor, what I was about to say——

"The Court. Now, please don't argue with me. I just made a statement to you. You understand what I said.

"Mr. Redfield. Well, the New York Times stated that it was the greatest robbery of all times——

"The Court. That is all right.

"Mr. Redfield. ——including the Brink's robbery.

"The Court. Just a second, I want the record to show that you have deliberately and quietly and composedly listened to this Court advise you as to the proper scope of argument to the jury, and in that comment to you the Court pointed out that it had gone over the same subject with you in chambers. [See Tr., vol. VII, page 1890, line 1 - p. 1892, line 16.] I want the record to show that after you listened, apparently respectfully, as soon as the Court had ceased its comment to you, in one rush of words you blurted out just exactly the thing the Court was telling you could not be used in argument."

But the defendant would now have us isolate the several reprimands given by the Court and then find that he was prejudiced thereby. This we refuse to do.

> "Merely because a statement is made or question asked by court or counsel in the heat of a spirited trial which subsequently in the cool ivory tower of appellate court chambers seems inappropriate, does not make the stating nor the asking prejudicial error." *Bush v. United States,* 267 F.2d 483, 488 (9th Cir., 1959).

At least the case law is clear: in determining whether the comments of the Court were prejudicial, we may take into account the fact that it was the defendant who provoked them. *Butler v. United States,* 191 F.2d 433, 436 (4th Cir., 1951) ("Where counsel persists in obnoxious actions, the court must be free to warn them of any such improprieties."); *United States v. Dennis,* 183 F.2d 201, 225-26 (2d Cir., 1950), affirmed 341 U.S. 494 (1951) (the leading case on the subject, wherein Learned Hand. J., noted: "The record discloses a judge, sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who, if at times he did not conduct himself with the imperturbability of a Rhadamanthus, showed considerably greater self-control and forbearance than it is given to most judges to possess."); *United States v. Liss,* 137 F.2d 995, 999 (2d Cir., 1943), cert. den. 320 U.S. 773 (1943); *Moore v. United States,* 132 F.2d 47, 57 (5th Cir., 1942), cert. den. 318 U.S. 784 (1942); *United States v. Lee,* 107 F.2d 522, 529-30 (7th Cir., 1939), cert. den. 309 U.S.

659 (1939); *Hargrove v. United States*, 25 F.2d 258, 262 (8th Cir., 1928); *Magen v. United States*, 24 F.2d 325, 329 (2d Cir., 1928), cert. den. 277 U.S. 595 (1928).

Furthermore, as evidence of the fact that the Court's comments did not prejudice the defendant, we would note that he was not "disabled in any way from doing his duty. * * * He made no claim to be disconcerted. He continued to conduct the trial with his accustomed vigor and skill." *Steinberg v. United States*, 162 F.2d 120, 123-24 (5th Cir., 1947), cert. den. 332 U.S. 808 (1947). In addition, it will be noted that there is no evidence whatever that the Court "expressed even indirectly any opinion as to the guilt of the accused." *United States v. Liss, supra*, at 999.

Of great significance, too, is the fact that the Court carefully instructed the jury as to the reasons for its admonitions to counsel, and specifically cautioned the jury that it was to draw no inferences therefrom.[21] In

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[21]The following instruction appears at Tr., vol. VIII, p. 2076, line 10 - p. 2077, line 4:

"It is the duty of the Court to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure. You are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case.

"By such remarks this Court did not then and does not now intend to favor one party against the other, or to intimate to the jury what weight they should give to the evidence or what degree of credibility they should give to the respective witnesses, or to disparage in any degree any of counsel or the defendant acting as his own attorney. As to any such remarks of the Court addressed to LaVere Redfield you are to consider them to have been addressed to him as an attorney in the case—his own attorney—and not to him as the defendant in the case.

"Such remarks and comments as the Court addressed to counsel and defendant as his own attorney were for the sole purpose of enforcing the rules of evidence and procedure, and

light of this instruction, it is impossible to see how the comments of the Court prejudiced the defendant.

> "We have carefully examined the trial record and as a result we do not believe that these comments between court and defense counsel so misled and prejudiced jurors that they became partisans of the prosecution. We cannot abandon our faith in the capacity and desire of a Federal jury to avoid being mired in irrelevancies, and the record does not reveal that the jurors in the case lost or discarded their innate sense of fair play and were inspired to render a verdict not based entirely on the evidence admitted by the court.
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> "This conclusion is fortified and emphasized by the important fact that the court gave specific instructions to the effect that jurors must wholly disregard court rulings and comments during the trial; that because the court had admonished and reprimanded counsel in connection with the conduct of the trial, the jury should not draw any inferences from the remarks or comments or rulings of the court on those occasions that the court was intending to convey to the jury in any manner whatsoever its view or opinion as to what the verdict should be—that (such) comments of the court were only pursuant to the power and duty of the court to supervise the trial and expedite it—that (any) admonitions or reprimands were matters only between the court and the attorneys and that they cannot and must not reflect in any manner upon the guilt or innocence of the defendants.
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for the purpose of maintaining courtroom decorum during the course of the trial."

> "These unambiguous and eminently fair instructions reach straight down into the very heart of the problem posed by appellant's contentions. If any member (or members) of the jury had felt the slightest uncertainty as to the possible attitude of the judge, these blunt admonitions were sufficient to lay any doubt at rest." *Shockley v. United States*, 166 F.2d 704, 712 (9th Cir., 1948), cert. den. 334 U.S. 850 (1948).

See, in this connection, *United States v. Angelo*, 153 F.2d 247, 252 (3rd. Cir., 1946) ("Whatever unfavorable impression the jury may have received from certain of his remarks, the charge to the jury swept it away.").

Finally, we would point out that the evidence of defendant's guilt was so overwhelming that the comments of the Court were not such "as to cause a verdict to be rendered against [defendant] which otherwise would not have been found by the jury. *Gariepy v. United States*, 220 F.2d 252, 264 (6th Cir., 1955), cert. den. 350 U.S. 825 (1955). See also *United States v. Wheeler*, 219 F.2d 773, 778 (7th Cir., 1955), cert. den. 349 U.S. 944 (1955); *United States v. Lee*, 107 F.2d 522, 529-30 (7th Cir., 1939), cert. den. 309 U.S. 659 (1939); *Addis v. United States*, 62 F.2d 329, 331 (10th Cir., 1932), cert. den. 289 U.S. 744 (1933); *Magen v. United States*, 24 F.2d 325, 329 (2d Cir., 1928), cert. den. 277 U.S. 595 (1928). It is well established, of course, that in determining whether there has been prejudicial error, we may consider that, even had the error, if any, not been committed, the jury would have found defendant to be guilty in light of

the overwhelming amount of virtually uncontradicted evidence against him. See *Lutwak v. United States*, 344 U.S. 604, 619 (1953); *Thomas v. United States*, 281 F.2d 133, 136 (8th Cir., 1960); *Homan v. United States*, 279 F.2d 767, 771 (8th Cir., 1960), cert. den. 364 U.S. 866 (1960) ("Errors of the trial court which may be prejudicial in a close criminal case, in the sense of being capable in such a situation of possibly affecting the result, can well be without any such rational possibility in a strong case, and thus not entitle the defendant to a reversal of his conviction."); *United States v. Sheba Bracelets, Inc.*, 248 F.2d 134, 145 (2d Cir., 1957), cert. den. 355 U.S. 904 (1957); *United States v. Spadafora*, 181 F.2d 957, 959 (7th Cir., 1950), cert. den. 340 U.S. 897 (1950); *Ippolito v. United States*, 108 F.2d 668, 671 (6th Cir., 1940); *Fitter v. United States*, 258 Fed. 567, 573 (2d Cir., 1919); *Johnson v. United States*, 215 Fed. 679, 685 (7th Cir., 1914); *compare Berger v. United States*, 295 U.S. 78, 89 (1935); *United States v. Carmel*, 267 F.2d 345, 347 (7th Cir., 1959).

B. Allegedly prejudicial argument of government.

The defendant also urges that he was denied a fair and impartial trial by virtue of the closing argument of the United States Attorney. The brief remarks in question are set out in full below.[22] A reading of them,

[22]The following appears at Tr., vol. VIII, p. 2026B, line 18 - p. 2027, line 9:

"May it please the Court, ladies and gentlemen of the jury:

"I want you to know that I will not give dignity to the remarks of Mr. Redfield by responding to them. I have some fifteen pages of notes taken during the course of those remarks. They will be discarded.

particularly in light of the defendant's argument,[23] reveals that there was nothing whatsoever which was

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"Ladies and gentlemen, this is a nation of law, not of men. It would appear that this financial baron of Mount Rose is above the law. He has shown an arrogant contempt for my office, of this Court, of the United States and its many institutions. I am disgusted and indignant by his conduct here in court today, and for him I must apologize to the Court and to this jury.

"You are called upon to render your verdict on the evidence and the testimony adduced at this trial, nothing else. I ask only one thing that you do justice to this defendant, that you do justice to the United States."

[23]In addition to the examples set out in footnote 18, we cite the following passages from the defendant's argument:

Tr., vol. VIII, p. 1994, lines 15-17 ("One of the Government men has boasted that those costs [of defendant's trial] to date have run in excess of $50,000.00 he believes."); p. 1995, lines 5-9 ("I guess it is just the habit these men have and the way that—the habit they have fallen into in spending taxpayers' dollars; the habit of spending the funds of this nation of these taxpayers with reckless abandon."); p. 2007, lines 17-20 ("You know, Mr. Morvay was subpoenaed by the plaintiff to testify in this case. Why was he not put on the stand? You know, Morvay was scheduled to be indicted by the grand jury for using the mails to defraud."); p. 2008, lines 5-6 ("The reason doesn't speak well of those in public office, some of them, too—"); p. 2008, lines 11-14 ("Well, anyway, in this Government we do have some little men serving in big jobs, little men who are so small that they would have to stand on a soap box to stroke the fur on the back of a common house cat."); p. 2009, line 1 ("You know, some of the two-bit employees—"); p. 2009, lines 10-17 ("The Court. That is what I thought you said, Mr. Redfield. Is that a correct transcription of your first [and just quoted supra] statement? Mr. Redfield. Yes. The Court. Go ahead. Mr. Redfield. ——who are in the Internal Revenue Service—the Service of Eternal Revenue—would not hesitate to put an innocent man behind prison bars if, by so doing, it would serve a promotion in his own job."); p. 2012, line 24 - p. 2013, line 7 ("Mr. Redfield: Thank heaven I live in a country where I do not have to sit by and put up with the Gestapo tactics, and which do not have to be endured by any of us; where I can at least be judged by at least twelve men and women of my equal. If such is allowed to continue none of us is safe; none of us will be able to tell when he will be next. The Court: If what is allowed to continue? Mr. Redfield: The tactics of the Revenue Service. You don't know when you might be singled out for special treatment."); p. 2020, lines 11-14 ("but counsel yesterday would make an issue of that to show how small I was—not half as small as

"intended to inflame the jury against the defendant." The United States Attorney spoke in a calm, deliberate manner. Nothing was said which, under the circumstances, possibly could prejudice the defendant. There was no error in allowing the remarks to stand.

VI. There Was No Error in the Supplemental Instruction as Given by the Court.

Defendant also complains that this Court erred when it gave the jury a supplemental instruction midway through its deliberations. Specifically, defendant objects to this Court's failure to include in the so-called *Allen*-type instruction a reference to the rules that the defendant is presumed to be innocent and that the government must prove guilt beyond a reasonable doubt. The instruction in question appears at Tr., vol. VIII, p. 2103, line 1 to p. 2104, line 22.

Initially, we hasten to point out that defendant has waived his right to raise this particular allegation of error. This is because, in conformity with the practice as set out in Rule 30, Federal Rules of Criminal Procedure, this Court specifically inquired of both parties whether they had any objections to the instruction as given, and the defendant, as well as the government, responded in the negative. Tr., vol. VIII, p. 2105, lines 1-20. Since, as we have indicated earlier, defendant should be given no special advantage because he appeared *pro se*, he comes within the well-established general rule that failure to object to an instruction

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the men I have told you about, the little men in big places in Government."); p. 2021, lines 16-18 ("but there are a few which certainly are not a credit to their fellow employees; they are even a discredit to themselves.").

results in a waiver of the right to assign that instruction as error. See *Cooper v. United States,* 282 F.2d 527, 534 (9th Cir., 1960); *Ryan v. United States,* 278 F.2d 836, 839 (9th Cir., 1960); *Harris v. United States,* 261 F.2d 897, 902 (9th Cir., 1958); *Davenport v. United States,* 260 F.2d 591, 595 (9th Cir., 1958), cert. den. 359 U.S. 909 (1959); *Pool v. United States,* 260 F.2d 57, 66 (9th Cir., 1958).

Quite aside from this procedural defect in defendant's position, however, we are also of the view that there is no merit to his position as a matter of substantive law. This is mainly because we are unimpressed with defendant's implicit argument that just because some courts have chosen to give an instruction in a given form, it is error to depart therefrom.

As the transcript demonstrates, the language used by this Court was significantly different from that condemned in the case which defendant cites, *Billeci v. United States,* 184 F.2d 394, 399 (D.C. Cir., 1950). It is, therefore, inapposite.

More importantly, the defendant's very argument was brought to the attention of the Court of Appeals for the Fourth Circuit, but rejected in the case of *Orton v. United States,* 221 F.2d 632, 635-36 (4th Cir., 1955), cert. den. 350 U.S. 821 (1955). There, Chief Judge Parker observed:

> "Complaint is made, too, that the judge did not repeat his charge on presumption of innocence and reasonable doubt when giving the supplemental instruction; but we think he could very well assume that the jury had in mind instructions

which he had given only an hour and a half before. Jurors should be given credit for having ordinary intelligence; and if there is one doctrine of the criminal law which they probably understand better than any other it is the presumption of innocence and the burden resting upon the prosecution to establish guilt beyond a reasonable doubt. Nothing said in the supplemental charge had any tendency to becloud this doctrine and there was no reason to repeat what had been said plainly with regard thereto."

In addition to the fact that upon giving the supplemental instruction the Court suggested to the jury "that you again retire and carefully consider all of the evidence in the light of the Court's instructions, a copy of which you have with you," Tr., vol. VIII, p. 2104, lines 17-19, those instructions made clear reference to the presumption of innocence and/or the requisite burden of proof on at least thirteen different occasions, and two of the instructions dealt at length with the subject.[24]

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[24]The following references are all to Tr., vol. VIII: Page 2039, lines 20-23 (each element must be proved beyond reasonable doubt); p. 2042, lines 14-18 ("If, upon consideration of the evidence, you find beyond a reasonable doubt that the total taxable income . . . was willfully understated in a substantial amount with specific intent to evade . . . ."); p. 2042, lines 23-25 (reasonable doubt that the offenses were committed on certain dates); p. 2043, lines 5-6 (must prove act and intent beyond reasonable doubt); p. 2043, lines 8-12 (willfully unreported income beyond reasonable doubt); p. 2043, line 14 - p. 2044, line 13 (lengthy instruction setting forth presumption of innocence, burden of proof is on government, and concept of reasonable doubt); p. 2044, lines 14-17 (reasonable doubt defined); p. 2044, lines 18-19 ("The Government must prove every element of each offense charged beyond a reasonable doubt."); p. 2046, lines 17-18 (law presumes that person is innocent of crime or wrong); p. 2051,

Finally, we would cite those cases where the various Courts of Appeals, including our own, have approved the *Allen*-type instruction even though it did not contain references to reasonable doubt. *Suslak v. United States,* 213 Fed. 913, 919 (9th Cir., 1914); *Sikes v. United States,* 279 F.2d 561, 562 (5th Cir., 1960); *Kleven v. United States,* 240 F.2d 270, 273 (8th Cir., 1957) (opinion by the now Mr. Justice Whittaker); *Johnson v. United States,* 5 F.2d 471, 476 (4th Cir., 1925), cert. den. sub. nom. *Eick v. United States,* 269 U.S. 574 (1925); *Shaffman v. United States,* 289 Fed. 370, 374 (3rd Cir., 1923) (also noting, at p. 375, that "the trial judge, however, is vested with a wide latitude of discretion.").

VII. Conclusion.

The gist of defendant's reasons in support of his motion is that the Court, by action (or failure to act) and by comment so prejudiced the defendant that he is deserving of a new trial. As we pointed out at the beginning of this opinion, the burden was on him to sustain the proposition. This he has not done. This is because, even as an abstract proposition, we fail, in all humility, to find any error. But, even assuming solely for purpose of argument, that there were errors, we think it appropriate to note the statement of the Supreme Court in *Lutwak v. United States,* 344 U.S. 604, 619 (1953): "A defendant is entitled to a fair

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lines 1-4 (requisite intent must be proved beyond reasonable doubt); p. 2056, lines 3-14 (reasonable doubt that defendant did the acts charged); p. 2058, lines 14-23 (fraud beyond reasonable doubt); p. 2071, lines 5-10 (intent to evade beyond reasonable doubt).

trial but not a perfect one." That he received a fair trial is fully demonstrated by the record taken in context and as a whole. Having chosen, in a competent, intelligent and understanding manner, to defend himself, he proceeded to set himself apart from, if not above, the law. No court need tolerate such conduct. He insists on another trial despite the overwhelming evidence of his guilt, because this Court did not accord to him special privileges which were not his due. "Surely judges did not win their freedom from the crown only to lose it to those who set themselves against the sovereign." *United States v. Christakos*, 83 F.Supp. 521, 525 (N.D. Ala., 1949), affirmed sub. nom. *Woolard v. United States*, 178 F.2d 84 (5th Cir., 1949).

The interest of justice will not be served by the granting of a new trial. The motion will be denied.

VIII. Order.

It is the ORDER of this Court that the defendant's motion for a new trial be, and the same hereby is, denied.

Dated at Las Vegas, Nevada, this 23rd day of March, 1961.

JOHN R. ROSS,
United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

Lavere Redfield, Appellant, vs. United States of America, Appellee.	No. 17,317 Oct. 16, 1961

Appeal from the United States District Court
for the District of Nevada

Before: HAMLEY, HAMLIN and KOELSCH,
Circuit Judges

PER CURIAM

This is an appeal from a judgment of conviction on six counts of an eight-count indictment charging income tax evasion in violation of Section 145(b), Internal Revenue Code of 1939, and Section 7201, Internal Revenue Code of 1954, 26 U.S.C.A., § 7201. Appellant argues four grounds for reversal, namely: (1) he did not competently and intelligently waive his right to assistance of counsel at the trial; (2) he was so ignorant of law and procedure and his defense was so inadequate and incompetent that he has been deprived of his liberty in violation of his rights under

the Sixth Amendment; (3) he was denied an impartial trial by virtue of the prejudicial nature of the trial judge's treatment of appellant throughout the trial; and (4) during the closing argument the attorney for the Government appealed to the passion and prejudice of the jury concerning irrelevant matters, thereby tending to inflame the jury against appellant.

Each of these points was presented in the trial court on appellant's motion for new trial, appellant being represented by counsel in that proceeding, as he has been in this court. The order of the district court denying the motion for a new trial is preceded by an exhaustive opinion discussing each of these arguments, supported by detail documentation as to both facts and law. *United States v. Redfield*, DC Nev., F.Supp. filed March 23, 1961.

Our study of the record completely corroborates the district court's review of the trial court proceedings, as set forth in the described order. We are likewise in full accord with the legal conclusions based thereon, as also set forth in that order. Under the circumstances, no worthwhile purpose will be served in filing an opinion of this court discussing the facts and law involved on this appeal. We adopt as our opinion, the opinion and order of the district judge and, on the basis thereof, the judgment is affirmed.

(Endorsed) Per Curiam Opinion Filed Oct. 16, 1961.

Frank H. Schmid, Clerk.

Appendix C

United States Court of Appeals
for the Ninth Circuit

Lavere Redfield, Appellant, vs. United States of America, Appellee.	No. 17,317

JUDGMENT.

Appeal from the United States District Court for the District of Nevada.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered October 16, 1961.

Appendix D

EXCERPTS FROM TESTIMONY OF MARTIN HOFFENBLUM, INTERNAL REVENUE SERVICE AGENT

Transcript Vol. 8 Page 1326, Line 21 to Page 1327, Line 6.

"Q. What did you do?

A. First I asked Mr. Redfield to produce his records of the transaction.

Q. What did he say with respect to that?

A. He at first said he was busy, but he would produce them. Then later on, why, he just he wouldn't produce them. That is all.

Q. Did he make any statement as to whether he would produce them at any time in the future?

A. The last conversation I had with him, it was to the effect that he saw no point in producing his records."

Transcript Vol. 8 Page 1333, Line 7-10.

"He had no explanation for that, but he did say that he would try to ascertain the cost basis of the stock that he sold relating to Munsingwear, Incorporated. He never did give me that."

Transcript Vol. 8 Page 1333, Line 16-22.

"I asked what his cost basis was, and he said he didn't know, but he would try and find out.

I asked him for his records to support his cost basis for the period 1951 through 1956 on securities which he had sold during that period. He promised to bring that in. He also promised to bring in the detail of

the income reported on his tax returns for the period 1952 through 1956.

Transcript Vol. 8 Page 1338, Line 3 to Page 1339, Line 11.

"Q. When was he to come back?

A. The following day.

Q. Did he agree to bring anything with him at that time?

A. Yes. He said he would bring the detail of his income reported on his returns for 1952.

Q. Alright. Then he did come in on the 6th of November?

A. Yes, sir.

Q. Same place?

A. Same place.

Q. The same persons present?

A. Same persons present, Mr. Powell, Revenue Agent, myself and Mr. Redfield.

Q. Alright. What did he bring with him, if anything?

A. He brought the detail of his 1953 income tax returns. I asked him about the detail for '52. He stated he couldn't locate them, that it had probably been lost in the robbery in 1952.

Q. When you say he brought in the detail on his '53 return, I will hand you Exhibit 461 in evidence and ask you if that is the detail he brought in.

A. Yes, sir, it is.

Q. And 461 is a photostatic copy, is it?

A. It is a photostatic copy.

Q. Did you have at one time the original?

A. He brought the original and I photostated it and gave him the original back.

Q. Did he bring anything else in to show the detail of his 1953 besides Exhibit 461 at this time?

A. He brought a piece of paper, which was the original from which I photostated this.

Q. But outside of that, did he bring anything else in?

A. No, sir."

Transcript Vol. 8 Page 1365, Lines 12-17.

"I told him at that time that the Canadian Company dividends had been in issue in the Appellate Division in San Francisco when the amount of tax was discussed for the 1945 and '46 returns, and that he was informed at that time that the Canadian dividends were taxable. He didn't answer the question."

Transcript Vol. 8 Page 1365, Line 22 to Page 1366, Line 8.

"Q. Now, other than these detail sheets, detailing the income reported on his 1953 to 1956 returns, during your investigation did you ask him to bring in his records?

A. During the earlier conversations which I had with him in 1957, which were almost daily, he promised repeatedly to bring in his records of his security transactions and dividend income.

Q. Did he bring those records in to you?

A. No, sir.

Q. The only thing he did bring in were these sheets indicating the detail of the income reported?

A. Yes, sir."

Transcript Vol. 8 Page 1375, Line 16 through Line 22.

"Q. So if I were to inform you that there is approximately a quarter of a million dollars still due me from Morvay, you would not know whether that were so or not?

A. That is correct.

Q. I may have that amount still due from him?

A. Mr. Redfield, I asked you years ago to support that statement. You never did."

Transcript Vol. 8 Page 1382, Line 11-21.

"A. At the end of our conversation in 1957, and I completed asking you about all the information which I had at the moment, getting your explanation for it, and you still had not brought in your records, Mr. Redfield, although you had promised me each day that you would—so when I had run out of items which I knew about it and wished to get your explanation for, I stated or asked you would you please bring in your records. You said you would, and I said I would wait a reasonable length of time and if you did not appear, then I had no choice, Mr. Redfield, but to deal through third parties. That was my statement to you."

EXCERPTS FROM TESTIMONY OF HARRY M. GREEN, INTERNAL REVENUE SERVICE AGENT

Transcript Vol. 8 Page 1223, Lines 2-18.

"A. I asked for Mr. Redfield's and Mrs. Redfield's records pertaining to the tax returns for 1945 and 1946.

Q. And did you get them?

A. What I received, which Mr. Redfield said was all he had in the way of records for those two years, was a few broker's slips for 1945 and 1946, showing some purchases and sales of stock, and aside from that all I received was two pieces of paper for each of the years '45 and '46. On one sheet of paper for each of these two years there was a summary of the names of the companies that had paid him dividends and the amounts that they had paid, and the total at the bottom of the sheet. The other sheet listed the securities that he had sold during that particular year, '45 or '46, and as to the companies and sales price and the date purchased and the date sold.

Q. Were these details given on the returns?

A. No, they were not."

Transcript Vol. 8 Page 1231, Line 21 to Page 1238, Line 1.

"Q. What did you do in trying to start your audit?

A. I wrote Mr. Redfield a letter asking that—telling him that I had returns for those three years to audit, asking that he make available all records pertaining to those three years.

Q. Do you have a copy of that letter with you?

A. Yes, sir, I do. The letter is dated July 22, 1955.

Q. It contains some language down on the bottom of the copy?

A. Yes, sir.

Q. What does that relate to?

A. That was my contemporaneous note dated August 2, 1955, which I—which followed up the letter of July 22, and I was trying to get another appointment,

and the note states there, which I made at the time on August 2, 1955, that Mr. Redfield wanted a little more time and would get in touch. . . . (Letter received in evidence as Government's 451, there was no objection.)

Q. Now the letter is dated July 22, 1955?

A. Yes, sir.

Q. And when did you contact—after that date when did you contact Mr. Redfield?

A. I believe it was in September.

Q. Well, what did you do? Did you get an answer to your letter? Let's start out that way.

A. Well, this July, 1955, I did not get an answer.

Q. Did you call him on the phone?

A. In August of 1955 I called him on the phone and he said he would let me know, and I didn't hear anything further, so I wrote him again either in August or in the early part of September.

Q. Do you have your copy of your second letter to him?

A. Yes, sir, I do.

Q. When was this letter written?

A. This letter was dated August 29, 1955, and I again asked for another meeting date so that we could begin the audit. . . . (Copy of letter received in evidence as Government's 452.)

Q. In that letter did you set a date, that is, Exhibit 452, did you set a date for an appointment with him?

A. I think I did. Let's see the letter. Yes, I set a date of September 12, 1955, for him to be in the office and have all his records available for the audit.

Q. And what happened next?

A. In the early part of September, 1955, Mr. Redfield came in to see me at the office and said he couldn't make the September 12th meeting, and again asked for a little more time.

Q. Do you have a memorandum of that interview with Mr. Redfield?

A. Yes, sir, it is a pencil memorandum dated September 2, 1955.

Q. And this was made at the time Mr. Redfield came in, or immediately thereafter?

A. It was immediately after he had come to the office. . . .(Memorandum received in evidence as Government's 453.)

Q. I believe you said that Mr. Redfield said at that time that he was unable to make the appointment?

A. Yes, sir.

Q. What arrangement did you make with him at that time?

A. Well, I didn't hear from him in the next week, so I again wrote him, wrote to him, asking for another time.

Q. Do you have a copy of that letter?

A. I believe so.

Q. What date is that?

A. This letter is dated September 13, 1955, and I again set up another meeting date.

Q. You set up another meeting date in that letter?

A. Oh, no, I apparently didn't set up an exact time. I said—let's see—I merely in this letter stated—May I read just a couple of portions?

Mr. Maxwell. No, I will offer the letter in evidence at this time as Government's Exhibit next in order. . . . (Letter received as Government's No. 454.)

Q. Alright. Now, Mr. Green, you may read from the letter.

A. Yes, sir, just a sentence or two which brings out the pertinent facts in this case.

'As you asked for additional time on September 2, 1955, before beginning the audit of your returns for 1952-1954, inclusive, this is merely to emphasize that when you make your records available for my inspection covering these years, such records will also include your bank statements, bank deposit books, and cancelled checks for accounts relating to you and your wife, whether the banks be in Reno or elsewhere.

'If any of the bank accounts you use for your business and personal transactions are in the names of others, such accounts would naturally be part of your records for income purposes.'

The letter is asking for a call prior to the end of September, 1955.

Q. Did you receive such a call, Mr. Green?

A. No, sir.

Q. Did you thereafter try to contact Mr. Redfield?

A. I wrote him a letter.

Q. When did you write him another letter?

A. In the early part of October, 1955.

Q. Do you have a copy of that letter?

A. This is a copy. . . . (Letter received as Government's 455.)

Q. In this letter did you set a date for an appointment?

A. Yes, sir, I did.

Q. What date was that?

A. I believe it was October 17th. Yes, October 17, 1955.

Q. Did Mr. Redfield come in on that date?

A. No sir, he did not.

Q. Did you attempt further to contact Mr. Redfield after October 17th?

A. No, sir.

Q. Why not?

A. Because on October 18th the case was reassigned to another agent at the request of Mr. Redfield."

EXCERPTS FROM TESTIMONY OF WILLARD D. SNOW, INTERNAL REVENUE SERVICE AGENT

Transcript Vol. 8 Page 1289, Lines 8-20.

"Q. And you were assigned, then, the examination on October 20, 1955?

A. That is right.

Q. Thereafter did you contact Mr. Redfield?

A. Yes. I contacted Mr. Redfield by telephone in December of 1955, and I told him that I had been assigned to his 1952, 1953 and 1954 income tax returns, and I would like to know when it would be convenient to make an examination of the records from which these returns were prepared.

Q. What did he say?

A. He stated that at that time he was rather busy and could I contact him the first part of the year, and he would arrange for a conference or a meeting."

Transcript Vol. 8 Page 1291, Line 1 to Page 1292, Line 13.

"A. The first thing that I asked Mr. Redfield was for a breakdown on the dividends and security sales that appeared on his 1952, '53 and '54 returns.

Q. What do you mean, 'a breakdown'?

A. Well, a detail, as Mr. Redfield had filed all of these returns with just one figure for dividends and one figure for security sales. An examination couldn't be started without first finding out what detail went into these total figures.

Q. Alright. What occurred then?

A. Mr. Redfield produced two white sheets of paper, one containing a list of the dividends for 1953, and another containing a list of dividends for 1954.

Q. What about 1952?

A. He said that he didn't have any detail for the year 1952.

Q. Alright. What type of list of dividends was this, or what type of list did he give you?

A. Well, it was just a list giving the name of the company and the amount of the dividend received for each company.

Q. How about capital gains for security transactions?

A. He was able to produce detail of three transactions which went to make up the total figure of the security sales in 1954, but he could furnish no detail for the security sales in 1952.

Q. Did you ask him if he kept any other records or any records at all of his dividends and gains?

A. Yes. I asked him if he kept a stock ledger or a dividend ledger from which I could see what his total stockholdings were, or total dividends that he might have received, and he said that he did not keep such a record. I then asked him if he would give me a net worth statement or a total list of all his security holdings, and he said that he would not, he didn't think that it was necessary.

Q. Did you ask him for bank records?

A. I asked him if he kept his bank statements and cancelled checks, and he said that he did not."

Transcript Vol. 8 Page 1295, Lines 6 through 24.

"Q. Now during the year 1956 did you contact Mr. Redfield in an attempt to get information on the cost basis of the securities which you have mentioned?

A. Yes. I contacted Mr. Redfield several times by telephone in an attempt to get this information, and each time he told me that he was very busy and that when he had some time and he could get the information, he would give me a call.

Q. Did you then do some investigation with respect to his brokerage transactions?

A. Yes. I contacted various brokerage houses, and I discovered numerous omitted sales. I discovered that Mr. Redfield had sold one million—over $1,200,000.00 worth of Pacific Clay Stock, and I noted that on his return he had only reported some $837,000.00.

So I called him again on the telephone and asked him if he could meet with me to discuss some of my findings to see if there was some explanation for his discrepancy, and he again stated that he was very busy."

Transcript Vol. 8 Page 1299, Line 13 to Page 1300, Line 5.

"Q. Alright. Did you after that date, did you try to get Mr. Redfield to come in to talk to you any further?

A. Yes. This was just one of the items I was concerned about, but it was the largest and I still wanted to get some explanation of some of the other transactions, and I called him two or three times in an attempt to meet with him to get some explanation on these omitted transactions, and I got the same reply, that he was too busy.

However, on one of these occasions, after I had talked to him on the phone and he stated that he was too busy, I noted that he was playing roulette on three consecutive afternoons at the Nevada Club.

Q. You saw him at the Nevada Club?

A. I saw him.

Q. Did he, however, come in to see you after February of 1956, I believe this was?

A. I finally was successful in getting Mr. Redfield to come in to see me in May of 1957."

Transcript Vol. 8 Page 1301, Lines 13 through 20.

"Then I specifically asked him about the 100 shares of Mergenthaler Linotype that was reported on his 1954 return, because he had only this stock slightly over one year, and I asked him why he had not reported the correct cost basis which represented a fairly current transaction. The stock had cost him slightly over $2600.00, and he had reported the cost at over $3,000, and he said that he couldn't explain why he hadn't reported the correct cost."

Appendix E

EXCERPTS FROM REMARKS OF THE PROSECUTING ATTORNEY DURING HIS CLOSING ARGUMENT

Transcript Vol. 10, Page 1901, Line 25 et seq.:

"So when the Internal Revenue Service got Mr. Redfield's income tax returns for these years, 1953 to 1957, they were turned over to an Internal Revenue Agent to audit. That was Mr. Green. Remember him testifying here? He got the returns in August of 1955. At that point he tried to contact Mr. Redfield. Well, I believe his testimony was that Mr. Redfield did show up in the office one day for a brief statement unsuspectedly, but there is in the record here—I don't have the exhibits—the exhibit number is not available to me at the moment, but there is in the record here letter after letter which Mr. Green sent to Mr. Redfield to try to get him to come in and tell him what the details were on the returns, and he didn't make it. This is back in 1955. Now, bear this in mind, this is before the 1955 and 1956 returns were even filed.

"So finally Mr. Redfield decides he doesn't like Mr. Green. I don't know why. He has only seen the man once. In October or November of 1955 Mr. Snow was assigned the case.

"So Mr. Snow tried to telephone Mr. Redfield in December, 1955—we are still back in 1955—what happened? Mr. Redfield says, 'Well, I am a little busy, let's put it over to the first of the year'. So he did. Mr. Snow put it forward on his calendar and called

him again in January. Finally he made an appointment in 1956, I think the end of January, according to Mr. Snow. Bear in mind, still the 1955 and 1956 returns hadn't been filed.

"And he went out to see Mr. Redfield, as he testified, having for examination the 1952, 1953 and 1954 income tax returns, and he said to Mr. Redfield, 'Please, sir, can I have the details on these returns?' At this point Mr. Redfield begrudgingly gave him the itemization of the 1953 and 1954 dividends and the capital gain, or the two capital gains reported on his 1954 return. But he wouldn't let Mr. Snow have those documents; Mr. Snow transcribed them from his notes, as I think he said, on the back of envelopes. That was the only time Mr. Snow was able to see Mr. Redfield. After numerous attempts, he finally gave up because Mr. Redfield kept saying, 'I am too busy.' He was too busy gambling at the Nevada Club to give the detail to his government of the income he reported on his return.

"Harry Green, the Revenue Agent, who first had this in 1955 for examination, had also had the earlier years 1946 and 1947, for audit, and he testified that he had audited Mr. Redfield's returns for those earlier years. In between, Mr. Refield had not been audited, his returns had not been examined between '46 and '52. Mr. Green couldn't get any details as to his 1945 and 1946 audit."

Transcript Vol. 10, Page 1904, Lines 13 to Page 1906, Line 17:

"Going back to that notice to keep adequate records, at the bottom it states, 'Original of this notice was served this 8th day of April, 1952, upon La Vere Redfield at 370 Mount Rose, Reno, Nevada, by H. M. Green.' signed 'M. Green, Internal Revenue Agent.' That is the 8th day of April, 1952. Almost a year later the 1952 was due to be filed. That is not an issue here. A year after that comes the 1953 income tax return. Where are Mr. Redfield's records? They are not in evidence here.

"Now, you know, if you want to you can believe that a financial wizard like Mr. Redfield doesn't keep any records; that he keeps these complicated stock transactions in his head; that he keeps track of the enormous amount of dividends he receives, in his head; that he makes multimillion dollar loans without keeping track of what he does with the money; that he sells a million dollars worth of stock at one time without keeping track of what he has paid for that stock, whether he is making money or not. If you want to you can believe that he has no records, or that he keeps very inadequate records for that.

"Mr. Redfield is a financial wizard. You don't find a single loss in any of these brokerage accounts, not one. I might add that in becoming a financial wizard, it is very helpful if you don't have to pay income tax. Where are Mr. Redfield's records? We saw a briefcase on the table, fairly thick. Out of that, out of that briefcase one afternoon—the briefcase was very

carefully unzipped—very gingerly out came a receipt, a receipt for income taxes on Mr. Chisholm's account, a photostatic copy was produced, very gingerly the original receipt went back into the briefcase and the briefcase was zipped up again, and it stayed zipped up. . . .

"I think another illustration may be made with that receipt. If you will recall, Mr. Redfield asked Mr. Chisholm to produce that receipt and stated in court, as his own counsel, a week later that he had found it that very night. Mr. Chisholm had looked through a number of boxes to do some searching for the receipt which was then in Mr. Redfield's possession. If you had been in Mr. Redfield's shoes, would you have advised the Court that you had the receipt? Here it is. It is a receipt for the payment of taxes, Exhibit A in evidence. This is Mr. Redfield's record in evidence."

Transcript Vol. 10, Page 1908, Lines 3-10:

"This is income in his own name and in his own brokerage accounts, for the most part, and he gets that little slip from the brokerage house every month, and each and every one of those has a part of the form that says, 'The customer is urged to keep this record for his income taxes purposes'.

"Did Mr. Redfield keep those? I don't know. They are not in evidence."

Transcript Vol. 10, Page 1925, Lines 15-21:

"Let me ask you: How does the Government tell he didn't report those Canadian dividends? Only by

pulling his income tax returns for examination, sending a Revenue Agent on the long, weary road of trying to contact him between the times he isn't busy gambling at the Nevada Club or in Los Angeles attending to his brokerage accounts. It is the only way you are going to find out."

Transcript Vol. 11, Page 1959, Lines 7-17:

"Well, no detail again, so the agents asked him what were these losses on his amended returns, and he said, 'Oh, that is a loss I had from Mr. Morvay.' 'Oh,' the agents say, 'that loss.' 'Well, do you have any records?' 'Oh, yes, yes I have some records.' 'Well, could we take a look at them?' 'I will show them when the proper time comes,' said Mr. Redfield, and Mr. Hoffenblum has so testified.

"Well, ladies and gentlemen, the proper time has come and it has gone. Where are Mr. Redfield's records of the Morvay transaction?"

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No. 653

In the Supreme Court of the United States

OCTOBER TERM, 1961

LAVERE REDFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
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OPINIONS BELOW

The opinion of the district court denying a motion for a new trial (Pet. App. 1–64) is reported at 197 F. Supp. 559. The per curiam opinion of the court of appeals (Pet. App. 65–66), adopting the opinion of the district court, is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1961 (Pet. App. 67), and a petition for rehearing was denied on November 13, 1961 (R. 243).[1]

[1] The Record before this Court is comprised of eleven volumes. Volumes I and II contain the original record of the district court and court of appeals proceedings. Volume III is

On November 30, 1961, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to January 12, 1962. The petition was filed January 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was compelled to be a witness against himself in violation of his constitutional privilege against self-incrimination.

2. Whether, under the circumstances presented herein, petitioner was denied assistance of counsel.

3. Whether petitioner was denied a fair and impartial trial by virtue of certain remarks of the trial judge.

STATEMENT

On May 26, 1960, an eight-count indictment was returned against petitioner in the United States District Court for the District of Nevada, charging him with the willfully attempted evasion of his own and his wife's income taxes for the year 1953 through 1956, computed on the community property basis, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954 (Tr. 3). The reported and correct taxable income and tax liability, as alleged in the respective

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an index to the trial transcript. Volumes IV to XI contain the trial transcript. References to the original record will be designated "R." References to the trial transcript will be designated "Tr."

counts of the indictment, are as follows (R. 2-7; Tr. 2033-2038):

Count	Year	Reported		Correct	
		Income	Tax	Income	Tax
I	1953 (husband)	$36,107.97	$18,401.44	455,115.13	$30,652.44
II	1954 (husband)	186,748.63	91,502.11	306,133.80	160,181.38
III	1955 (husband)	74,076.79	34,492.22	155,992.54	84,102.73
IV	1956 (husband)	36,251.98	15,062.19	72,262.00	35,945.04
V	1953 (wife)	36,107.99	18,401.44	55,115.13	30,652.44
VI	1954 (wife)	186,748.63	91,502.11	306,133.80	160,181.38
VII	1955 (wife)	74,076.79	34,492.22	155,992.54	84,102.73
VIII	1956 (wife)	36,251.98	15,062.19	72,262.00	35,945.04

On October 28, 1960, after a jury trial, petitioner was convicted on all charges except Counts IV and VIII (R. 28; Tr. 2106-2110). On November 10, 1960, he was sentenced to imprisonment for five years and fined $60,000 (R. 33).

At the time of arraignment, petitioner, who is a wealthy man (Tr. 1972-1973, 1996, 2021; cf. Tr. 19, 23, 26), announced that, although he was financially able to employ counsel, he had decided to conduct his own defense (Tr. 3-10). Despite repeated efforts by the trial judge to make clear the dangers of such a course, petitioner persisted in this determination to act as his own attorney,[2] apparently motivated, at

[2] See the following passage in the opinion of the district court denying the motion for new trial (Pet. App. 12-13):

"• • • Between the time of arraignment on June 16, 1960 and the time the trial began, on October 4, 1960, this Court had occasion to meet with the defendant *in camera*. There were three to five such conferences, often as not dealing with de-

least in part, by reluctance to pay large attorneys' fees (Tr. 7, 11–40, 1982–1983; Pet. 23–25). During the trial petitioner frequently made statements of fact while cross-examining witnesses or addressing the court or jury, and was frequently admonished by the trial judge that he could not testify as to matters not yet in evidence while speaking in his capacity as counsel (see, *e.g.*, Tr. 784–799, 872–875, 911, 927–932, 1375–1391, 1557–1571, 1970–1992).

The government's evidence showed that petitioner had failed to report in his return large amounts of dividends, interest, and capital gain on the sale of securities (Tr. 1494–1554).[3] Many of petitioner's stocks were held in the names of nominees, and none of the dividends on these stocks were reported (Tr. 1510). The totals of the unreported income and evaded taxes established by the government's evidence for both petitioner and his wife are as follows (Tr. 1554–1557):

	Income	*Tax*
1953	$20,600	$10,400
1954	258,600	149,600
1955	294,400	175,800

fendant's desire to obtain a bill of particulars. On at least two of these occasions, there may have been more, the Court frankly discussed the matter of waiver with defendant, told him what he was getting into, and virtually pleaded with him to reconsider his determination to appear *pro se*. The defendant was adamant, but not in a belligerent manner. It was simply a case where an undeniably intelligent businessman had made an assessment of where he stood and what he wanted to do about it. He was stubborn about his decision, but gave absolutely no indication that he did not know exactly what he was doing."

[3] The detailed and exhaustive nature of the proof is indicated in the list of government exhibits in Vol. III of the record, pp. 8–46.

Petitioner did not take the stand in order to testify in his own behalf.

After the verdict, petitioner retained counsel who filed a motion for a new trial on November 3, 1960 (R. 33). The main contentions were that the trial court should not have allowed petitioner to waive his right to counsel, and that petitioner had been deprived of a fair trial by the court's efforts to prevent him from testifying from his place at counsel table. Retained counsel were allowed ample time to examine the trial transcript and document their arguments (Pet. App. 1–2). On March 23, 1961, the trial court filed an exhaustive opinion dealing with the numerous trial incidents upon which the motion was based (Pet App. 1–64). The court of appeals adopted this opinion as its own (Pet. App. 65–66).

ARGUMENT

1. (*a*) Petitioner asserts (Pet. 11–16) that his privilege against self-incrimination was violated because the court told him, when he persisted in making assertions of fact in the presence of the jury, that he could take the stand if he desired to testify. The contention is without merit, for, when the statements or directions of the court are examined in context, they will be seen to have been provoked by petitioner, and, indeed, to have been required if the trial was to be conducted with some degree of order and within the established rules of evidence. Repeatedly, while cross-examining a witness, petitioner would contradict and argue with the witness and make assertions of fact as to his own version of events. Thus, without taking the stand and

subjecting himself to cross-examination by the government, petitioner attempted to get his views across to the jury. The opinion of the district court, carefully treating each of these individual instances in context (Pet. App. 33–49), amply demonstrates both the provocation and the necessity for the court's action.

In similar circumstances, objections based on the privilege now asserted have been emphatically rejected. In *Smith* v. *United States*, 234 F. 2d 385 (C.A. 5th), where the accused appealed from his conviction after a trial during which he acted as his own attorney, the court of appeals affirmed. It observed (*id.* at 388–389):

> * * * [T]he court demonstrated great patience and unusual tolerance with the accused who undertook to combine argument, testimony in his own behalf, and interrogation of witnesses. The trial court would not conceivably have tolerated the self-serving statements made by the accused and his flat denials of statements made by witnesses, and his irrelevant comments, if made by a lawyer. In fact, the criticism now levelled at the trial court for referring to the right of the accused to testify in his own behalf arose entirely from the court's patient explanation, repeatedly made to Smith as he purported to cross examine government witnesses, that he could not argue with them or dispute them, as he repeatedly did, but that if he wanted to get his views to the jury he ought to take the witness stand. There is no merit in the contention that the court prejudiced appellant by any of such statements or by all of them taken together.

Accord, *Shelton* v. *United States*, 205 F. 2d 806, 810 (C.A. 5th); *Smith* v. *United States*, 216 F. 2d 724, 727 (C.A. 5th).

The cases cited by petitioner are not in conflict with the conclusion that, in the context of the present case, the statements of the court were proper. None of the cases cited involved a defendant who interjected his own unsworn statements into the trial, or a defendant or his counsel who did anything to put the judge in a position where a remonstrance was necessary.

(*b*) Petitioner further claims (Pet. 16–17), on the basis of a brief and transparently harmless passage in the record (Tr. 870–871), that he was compelled "to become a witness against himself." While cross-examining a witness, petitioner brought out certain facts favorable to himself, which showed that on a certain occasion petitioner had waived any right to interest in a business transaction out of sympathy and a desire to help the witness (Tr. 869–870). Merely by way of clarification, the court inquired of petitioner as to when the waiver had taken place and with respect to what specific property. Petitioner answered; the matter was clarified; and the only effect was to make clear the story which petitioner was trying to convey to the jury through the witness. There was clearly no prejudice to petitioner.

(*c*) Petitioner also argues (Pet. 17–18) that his privilege against self-incrimination was violated because of the admission of certain evidence as to the difficulty encountered by Internal Revenue Agents in their attempt to get any information from petitioner

during their audit of his tax returns. Petitioner also raises the same issue with respect to the prosecutor's comment on this evidence. But the contention is without merit, for the passages in the record (Pet. App. 68–84), upon which petitioner relies, show that, when the revenue agents called upon petitioner for information or records, he never claimed the privilege. On the contrary, these excerpts show that petitioner furnished the agents with fragmentary information; that he repeatedly promised to furnish more information; that his excuse for delay was merely that he was "very busy" (Pet. App. 78–79); and that, as to a net worth statement, "he didn't think that it was necessary" (Pet. App. 78).

Having failed to assert the privilege at the time, and having failed to assert it or to make any objection at the trial, petitioner cannot now raise the issue since the privilege is waived if a timely claim is not made. *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 112–113; *Rogers* v. *United States*, 340 U.S. 367, 370–371; *United States* v. *Monia*, 317 U.S. 424; *United States* v. *Murdock*, 284 U.S. 141, 148.

In the absence of a claim of privilege, the refusal, in violation of a taxpayer's statutory duty, to make available his records of income (see Sec. 54(a) of the 1939 Code; Sec. 6001 of the 1954 Code; Treasury Regulations 111, Sec. 29.54–1; Treasury Regulations on Income Tax (1954 Code), Sec. 1.6001–1) could be considered by the jury as "covering up sources of income" and being "conduct, the likely effect of which would be

to mislead or to conceal." *Spies* v. *United States*, 317 U.S. 492, 499. The jury was entitled to weigh this circumstance. The decision below is in accord with other decisions on the point. *Myres* v. *United States*, 174 F. 2d 329, 337 (C.A. 8th), certiorari denied, 338 U.S. 849; *Olson* v. *United States*, 191 F. 2d 985, 988–989 (C.A. 8th); *Beard* v. *United States*, 222 F. 2d 84, 92–95 (C.A. 4th), certiorari denied, 350 U.S. 846.

2. Petitioner urges (Pet. 19–30) that the trial court failed to make sufficient inquiry into his waiver of counsel. But petitioner's own summary of what occurred shows that his present contention is groundless (Pet. 21):

> There is no question, as was pointed out by the Trial Court in its opinion (Appendix A), that the Court explained the complicated nature of the proceedings to the defendant; ascertained that the defendant was able to employ counsel; and *offered to appoint counsel*, all of which was rejected by the defendant-petitioner. * * *

That there is a right to refuse counsel, as well as to have counsel, and that the court may not impose counsel, certainly in the case of an adult, intelligent member of the community, is well established. *Moore* v. *Michigan*, 355 U.S. 155, 161; *Adams* v. *United States, ex rel. McCann*, 317 U.S. 269, 279; *Carter* v. *Illinois*, 329 U.S. 173, 174; *Burstein* v. *United States*, 178 F. 2d 665 (C.A. 9th).

Petitioner, however, insists that the court should have inquired into his motive, which was a desire to

save money, and that the court should have told petitioner that the government would pay his attorney's fee, even though he himself could well have afforded to do so. This novel argument is unsupported by any authority and carries the idea of the right to counsel to an absurdity. Moreover, in its appraisal of petitioner's reasons for refusing to retain counsel, the trial court concluded that very likely the basis for the refusal was "a careful calculation * * * by an undeniably shrewd man," who probably realized that, appearing alone, he "could play upon the sympathy of the jury" (Pet. App. 20).[4] In any event, the court did everything it could to persuade petitioner to obtain counsel, and petitioner was perfectly aware of the risk he was taking in refusing to appear with counsel.

3. Petitioner calls attention (Pet. 30–32) to two instances where the court attempted to bring him into compliance with accepted standards of court-room manners and procedure, and argues that they constituted a denial of due process. In each instance, petitioner indicated amazement at the answers he received during his cross-examination of government witnesses. The trial court had previously given him several warnings against commenting on the credibility of witnesses. The rebukes, when read in context, were well deserved. (See Pet. App. 37–38, 45.)

[4] The petitioner's argument to the jury demonstrates his shrewdness, his intelligence, and his tactics in this case (Tr. 1970–2026).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 653.

LAVERE REDFIELD,

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vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The Government has cited one Circuit Court Case (*Smith v. United States*, 234 F. 2d 385 (C. A. 5th), brief page 6) for the proposition that petitioner's objections to the conduct of the trial court herein have been "emphatically" denied. The dissenting opinion of Judge Cameron at page 390 "emphatically" supports petitioner's contention of error. Judge Cameron stated as follows:

> "I agree with the statement of the majority that the Court below demonstrated patience in its effort to deal with one whose unreasoning and bellicose attitude made everything he did irritating and provocative. But the Trial Court did commit itself to be drawn unwittingly into what seems to

me to be serious errors. Those errors consisted in the repeated making of statements in the presence of the jury which tended to draw its attention to the fact that the appellant could be expected to take the stand in his own behalf. This episode may be used to illustrate what happened: One of the government investigators was on the stand and appellant was cross-examining him about the meaning of certain [documents]. . . ."

(Then the Trial Court stated to appellant).

"If you want the jury to consider what you have to say Mr. Smith, you ought to testify in the case. If you want your statements to be considered by the jury as evidence—as testimony and evidence, you ought to testify—take the witness stand and testify and be subject to cross-examination under the rules of evidence.

. . .

"For the Government's attorney and the Court to set upon appellant in this way was certainly prejudicial and unjustified.

"It is not sufficient answer to say that appellant had made it a practice throughout the examination of the witnesses to make statements of fact and to argue with the witness rather than confining himself to asking questions. In all of this, appellant showed an ignorance and naivete almost juvenile. At the same time, it was the duty of Government counsel and of the court to exhibit patience at every stage of the examination and to rule properly on objections and to refrain from saying anything from which the jury might infer

that it had a right to look forward to testimony from the lips of appellant. The attorney now representing appellant before us points out nineteen instances where references of a similar character were made. Of course, many of them were relatively harmless, but all of them tended to stress the idea expressed in the above quotation. It was not the province of the Court under the circumstances of this case to lecture the appellant repeatedly on a manner in which he should conduct his cross-examination. It seems to me that the Court could have avoided error by simply sustaining the objections as they were made. Few rights are more jealously guarded by the courts than the right of the defendant, exercised by appellant here, to fail to testify without having that failure commented on before the jury. C.F. 18 U. S. C. A. §3481 an dsee *Wilson v. United States*, 149 U. S. 60, 3 S. Ct. 765, 37 L. Ed. 650."

The cases of *Shelton v. United States*, 205 F. 2d 806, 810 (C. A. 5th) and *Smith v. United States*, 216 F. 2d 724, 727 (C. A. 5th) cited as being in accord with the majority opinion in *Smith v. United States*, 234 F. 2d 385 (C. A. 5th) are not in accord with said opinion. *Smith v. United States*, 216 F. 2d 724, 727 (C. A. 5th) does not even indirectly discuss the proposition for which the Government cites said case. The *Shelton* case, *supra*, fails to reflect any facts which specify the error of informing a jury that a defendant will, should or has a right to testify.

II.

The cases cited by the Government on page 8 of their brief, *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 112-113; *Rogers v. United States*, 340 U. S. 367, 370-371; *United States v. Monia*, 317 U. S. 424; *United States v. Murdock*, 284 U. S. 141, 148, have no relation factually or otherwise to the objections raised in the Petition for Certiorari.

III.

The error denying petitioner his privilege against self-incrimination is so patent and egregious that the matter should be referred to this Honorable Court's Summary Calendar.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1982

No. 653

LAVERE REDFIELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

October Term, 1961.

No. 653

LAVERE REDFIELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING.

Jurisdictional Statement.

This is a Petition for Rehearing upon the order of this Court denying the Petition for Writ of Certiorari dated February 26, 1962.

On March 15, 1962, the time for filing this Petition for Rehearing was extended to and including April 6, 1962 by order of W. O. Douglas, Associate Justice of this Court.

Grounds for Rehearing.

The grounds for this Petition for Rehearing are that other substantial errors occurred at the time of trial, denying petitioner due process of law; and these errors were not presented previously as grounds for the Petition for Writ of Certiorari, to wit:

A. *The petitioner was denied due process of law in that he was erroneously indicated, convicted and sentenced on multiple offenses for each taxable year where only one offense is denounced by statute; and in connection with this:*

1. The jury was erroneously instructed that each count in the indictment constituted a separate offense; and as to the elements of the offense.

2. Counts V, VI and VII of the indictment upon which petitioner was convicted charged, if anything, an entirely different offense than designated.

3. The entire judgment and sentence based on the erroneous verdict and charges in the indictment is excessive and erroneous.

B. The petitioner was denied due process of law by the supplemental and coercive charge to the jury given after the jury's retirement for deliberation.

Preface to Argument.

In presenting the original Petition for Writ of Certiorari to this Court, it was petitioner's belief that the violation of petitioner's privilege against self-incrimination was so flagrant and outstanding, (see *Stewart v. United States*, ... U. S. ....., 81 S. Ct. 941, where a third murder conviction was reversed for this reason alone), that to encumber the record further except to present a new and novel point to the Court regarding the right to counsel would be to gild the lily.

Petitioner's evident need for counsel, and denial thereof, (and thus due process of law) is further illustrated in the points raised in this Petition for Rehearing and emphasized in the decision of this Court handed down in *Chewning v. Cunningham* (decided Feb. 19, 1962), ... U. S. ....., 82 S. Ct. 498, where in passing on a recidivist's need for counsel, Justice Douglas *per curiam* stated at page 500:

> ". . . It is 'the nature of the charge' (Citation) that underlines the need for counsel. In trials of this kind the labrynth of the law is, or may be, to intricate for the layman to master. (Citations).
>
> ". . . We only conclude that a trial on a charge of being a habitual criminal is such a serious one (Citation), the issues presented under Virginia's statute so complex, and the potential resulting from the absence of counsel so great that the rule we have followed concerning the appointment of counsel in other types of criminal trials is equally applicable here."

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING.

A. The Erroneous Indictment, Conviction and Sentence.

Petitioner resided in a community property state and, as is set forth in respondent's brief (pp. 2-4), he and his wife filed separate returns splitting the income for the taxable years 1953, 1954, 1955 and 1956. An indictment was returned, charging petitioner with eight offenses under Section 145(B) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954.[1]

The question presented here has never been passed on before as far as research can determine: That the reporting of a single community income by separate returns of husband and wife constitute *one* offense in any taxable year where the husband prepares the returns as manager of the community (and assuming that the other elements of the denounced acts are present).

Section 7201 (whenever Sec. 7201 is mentioned, it is intended to include Sec. 145(B)) is an "attempt" statute. All that is necessary to complete the crime denounced is a tax evasion motive and some affirmative conduct toward this end.

Spies v. United States (1943), 317 U. S. 492, 63 S. Ct. 364.

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[1]As applied herein, Section 7201 is a repetition of the latter portion of old Section 145(b) except as indicated by the brackets:

"Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title [chapter] or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Under Internal Revenue Code Sections 1 and 6012, a taxpayer must report his full income in a tax return at a specified time. The taxpayer's obligation is thus measured by what is done or not done at the time the law says it must be done. This is a single obligation, and to insure against any wilful violation, the word "attempt" was used by Congress. "Thus the wilful failure to report all of taxpayer's earned income in the twelve-month period and to pay the full and correct tax due for that twelve-month period was to be punished as an attempt to evade the amount of tax due for that twelve-month period."

> Kostelanetz and Bender, 1957, *The Criminal Aspects of Tax Fraud*, p. 9 (Continuing Education of the Bar, the American Law Institute collaborating with the American Bar Association)

Section 7201 outlaws the willful attempt to evade a tax, and not simply the conduct employed to affect the attempt to evade. There are numerous ways in which evasion can be had such as reported sales, padding of purchases, fictitious bank accounts, false tax returns, all engaged in with a tax evasion motive. However, each of the methods is only evidence by which the *attempt* to evade is proved.

Spies v. United States, supra.

But each such method could not itself constitute an attempt to evade the statute as it defines the crime. A contrary interpretation would result in as many counts

or indictments of separate "attempts" in one taxable year based on as many multiple devices were employed, which is ridiculous.

See:

United States v. Beacon Brass, 344 U. S. 43, ... S. Ct. ..... (1952).

In effect equating each method of evasion as evidence of the "attempt" contemplated by Section 720.

A husband and wife, in a community property state, have the right to divide marital income. Because the husband is the head and manager of the community, a return by him alone is substantial compliance with the law, and the mere fact that his wife does not join with him in the making of the return does not affect the validity of the tax or assessment based on his return.

United States v. Pettigrew (1936), 81 F. 2d 666;

Binder v. Welsh (1939), 107 F. 2d 812;

Fee v. Arizona State Tax Commission (1940), 98 P. 2d 467.

Under the holding of *Spies, supra*, an overt act is required to complete the offense. But it is the intent or tax evasion motive which is important. In a community property situation, then, the husband can have only one intent to evade one tax.

The conduct prohibited under the statute involved is purely statutory and has no counterpart at the common law.

United States v. Miro (2d Cir. 1932), 60 F. 2d 58.

Of course, where penal statutes are involved, they must be strictly construed, and all reasonable doubt as to their meaning resolved in favor of the accused.

United States v. Reese, 92 U. S. 214, ... S. Ct. .....;

Jerome v. United States, 318 U. S. 101, ... S. Ct. .....;

Fasulo v. United States, 272 U. S. 620, ... S. Ct. .....

The instant case involves more than merely an excessive sentence since the "excess" is not separable from the residue and cannot be reached without disturbing the "legal" portion.

McKinney v. Finletter (..... Cir. 1953), 205 F. 2d 761;

Biddle v. Thiele (..... Cir. 1926), 11 F. 2d 235.

Although it is true that the jury brought in a verdict of "guilty" as to all counts of the indictment, the fact remains that Counts V, VI and VII involving the returns of petitioner's wife actually stated an offense under Section 7207 of the Internal Revenue Code of 1954.[2]

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[2]Section 7207 reads as follows:

"Any person who wilfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000.00, or imprisoned not more than one year, or both."

In applying the rule of strict construction to penal statutes, it is seriously contended that the "not more" provision of Section 7207 places a restriction on Section 7201 where the prosecution relies on the income tax return as being false or fraudulent.

Thus, the Grand Jury indictment returning a "true bill" was not in fact a true bill. The petit jury, at the time of trial, was instructed that Counts V, VI and VII constituted separate offenses.[3] The fact that the jury was never instructed as to Section 7207 and that the evidence itself could apply equally to this lesser offense certainly materially infected the whole trial and all the Counts. (Especially with reference to the "Allen charge" given and discussed *infra.*)

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[3]Volume XI, page 2038, line 16—page 2039, line 15.

"The defendant, La Vere Redfield, is charged with four separate attempts to evade and defeat the taxes of himself for each of the years 1953, 1954, 1955 and 1956.

"He is also charged with four separate attempts to evade and defeat the taxes of his wife, Nell J. Redfield, for each of the years 1953, 1954, 1955 and 1956. The statute is so framed as to make liable any person who attempts willfully and unlawfully to evade the tax of himself or of any other person, whether or not the evasion of the other person is with the knowledge of such other person.

"You are instructed that an attempt to evade income tax for one year is a separate offense from an attempt to evade for a different year. It is also a separate offense to evade and defeat the taxes of one's wife in each year. The indictment in this case, therefore, charges eight separate offenses, the first four offenses being attempts on the part of LaVere Redfield to evade his own taxes for each of the years 1953, 1954, 1955 and 1956, and the other four offenses being attempts on the part of LaVere Redfield to evade the taxes of his wife for each of the years 1953, 1954, 1955 and 1956. You may find the defendant guilty or not guilty on any or all counts."

Again at page 2102, the Court stated (line 6):

". . . In this case the verdict is either guilty or not guilty on eight counts. . . ."

In *Berra v. U. S.* (Mo. 1956), 76 S. Ct. 685, 351 U. S. 131, 100 L. Ed. 1013, the dissenting opinions of Justices Black and Douglas seem to more accurately point out the law with respect to the rights of an accused in affording an accused due process of law, and the fact that Section 7207 must in fact be a lesser included offense than Section 7201; and that thus, there was more than merely an erroneous sentence in this matter, but the entire judgment of conviction was erroneous and void.

As a matter of fact, something of this nature must have been in the jury's mind when, after deliberating for some time, a note was sent to the court asking if the jury could "recommend," and the following colloquy was had between the court and the foreman of the jury:

> "[The Court]: Do you wish to do that, Mr. Foreman? What was meant by could the jury recommend? What did the jury have in mind, or what did you desire the Court to comment on?
>
> "The Foreman: Well, naturally, these jurors are of different minds, and we felt that perhaps there were some extenuating circumstances and the jurors were deliberating the point, and they wanted to know if they are permitted to make a different recommendation than is shown on the sheet that was delivered to us . . ." [The Verdict sheet] [Tr. Vol. XI, p. 2101, line 19, to p. 2102, line 2.][4]

B. The Supplemental and Coercive Charge Given to the Jury.

The jury retired for their deliberations at 4:42 P.M., October 27, 1960. After eight hours of deliberation until 12:45 A.M., October 28, 1960, the Court

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[4]There is certainly a great deal of room and reason to suppose that more or clearer evidence was available or could be produced on behalf of petitioner.

The record establishes that the petitioner did not have the slightest conception of how to protect his rights in a criminal proceeding. The fact that petitioner did not register twenty objections during the entire four week period is discussed by the trial court in the opinion (App. A pp. 25-33).

The witnesses called by petitioner to produce "evidence" to refute the charges were either government witnesses already called by the prosecution or character witnesses.

was convened on receiving a message from the jury that it wished additional evidence. [Tr. Vol. XI, p. 2088.] At 12:58, another message was received indicating that the jury wished to adjourn, and the jury retired at 1:12 A.M. [Tr. Vol. XI, p. 2094.] At 10:00 A.M. that morning, the Court reviewed various requests with the jury including the one discussed in Point A, *supra*, and the following occurred [Tr. Vol. XI, p. 2102, line 24, to p. 2104, line 24]:

"The Court: At this time the Court will give to the jury one additional instruction:

Ladies and gentlemen of the jury, this is an important case. In all probability it cannot be tried better or more exhaustively than it has been on either side. It is desirable that you agree upon a verdict. The Court does not want any juror to surrender his or her conscientious convictions. Each juror should perform his or her duty conscientiously and honestly according to the law and the evidence. Although the verdict to which a juror agrees, of course, must be his or her own verdict, the result of his or her own convictions and not a mere acquiescence in the conclusions of other jurors, yet in order to bring twelve minds to a unanimous result you must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other.

You should consider that the case at some time must be decided and that you were selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to a jury more intelligent, more impartial

or more competent to decide it, or that more or clearer evidence will be produced on one side or the other.

In conferring together, you ought to pay proper respect to each other's opinions, with a disposition to be convinced by each other's arguments. On the one hand, if much the larger number of your panel are for conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanctity of the same oath; and, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and to distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their co-jurors.

In so stating, the Court again emphasizes that no juror should surrender his or her conscientious convictions and a verdict arrived at and to which a juror agrees must be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusions of other jurors.

I suggest that you again retire and carefully consider all of the evidence in the light of the Court's instructions, a copy of which you have with you, and I will send a copy of this additional instruction to you, and I am obligated to ask you

that you again retire and the Court will wait for further message from you.

/Now, Mr. Clerk, you may hand to the jury the original instructions plus the one additional instruction."

It is respectfully submitted that this additional charge to the jury in considering the entire case including the erroneous charges and the obvious reluctance of the jury to convict the petitioner so unbalanced the case in favor of the prosecution that petitioner could not have had a fair trial.

In connection with this, petitioner will quote to the Court from the American Bar Association Journal March, 1962, Vol. 48, page 271 under a broad title of "What's New in the Law" the following article discussing this exact point:

"Criminal Procedure . . . supplemental charges

"A trial judge's supplemental charge to a jury, apparently designed to encourage the jury to reach a verdict, has been held too coercive by the Court of Appeals for the Fifth Circuit and a conviction has been reversed thereby.

"So-called 'Allen charges' or 'dynamite charges' have been approved by federal courts many times since the United States Supreme Court in 1896 in *Allen v. U. S.*, 164 U. S. 492, found no reversible error in the particular language of a supplemental charge then before it. In this case, however, the Court found the bounds of the Allen charge exceeded.

"The jury received the case at 5:20 P.M., was brought back fifteen minutes later for the judge to correct an error in the charge, returned again at 7:00 P.M. to request a clarification on conspiracy, was called back at 10:10 P.M. when the 'dynamite charge' was given, returned at 11:46 P.M. to be asked whether they wished to go to a hotel for the night, and brought in a guilty verdict about thirty minutes later. In the supplemental charge the judge told them that the case had been completely tried, that some jury would have to decide it, that they were as competent as any other jury, that it was the duty of every juror to consult with each other juror, that they should be able to reach a verdict by following the principles of law given them and recalling the evidence, and that it was 'no credit to a juror to stand out in a pure spirit of stubbornness because he has taken a position'. The defendant excepted to the supplemental charge.

"The Court ruled that the trial judge 'went too far . . . when [he] expressed the opinion that, if the jury remembered the evidence and heeded the charge of the court, it ought to be able to agree upon a verdict', and it declared that there was no authority for the trial court's opinion that it was not to the credit of a juror to be stubborn. Declaring that the Allen charge itself approaches the ultimate permissible limit for a supplemental charge, the Court said: 'We think that, under all of the circumstances of this case, the words added by the court to the conventional Allen charge threw the charge out of balance and beyond the permissible limits to which a court may go in its endeavor

to influence the jury towards the rendition of a verdict.'

"(*Powell v. U. S.*, United States Court of Appeals for the Fifth Circuit, December 8, 1961, Cameron, J.)

"About a month later the same Court refused to reverse a conviction in a case in which the trial judge had given a supplemental charge with as much if not more, 'dynamite' in it. The Court declined to act because the defendant had not taken an exception. It also refused to say that there was plain error under Rule 52 of the Federal Rules of Criminal Procedure.

"In a strong dissent, one judge contended that if there ever was plain error, this was it, and that the case ought to be viewed as if an exception had been taken. He deplored the increased use of this type of supplemental charge and said that the time had come to forbid it. 'Like the silver platter', he remarked, 'this is too dear to keep. The cost in fundamental fairness is too great.'

"(*Huffman v. U. S.*, United States Court of Appeals for the Fifth Circuit, January 11, 1962, Cameron, J.)"

See also:

Billeci v. United States, 87 App. D. C. 274; 184 F. 2d 394, 24 A. L. R. 2d 881;

Allen v. United States (9th Cir. 1951), 186 F. 2d 439; and compare *United States v. Furlong* (7th Cir. 1952), 194 F. 2d 1.

In our case the trial court rejected the contention that the supplemental charge was erroneous on the

grounds that this petitioner had waived his objection because the court specifically inquired of petitioner whether he had any objection to the instructions and the petitioner responded in the negative. (Opinion, Appendix "A" to Petition for Writ of Certiorari, pp. 60-63.) The record reveals, however, that the court inquired as to whether there was any objection to the instruction *after it had been given and after the jury had retired.* [Tr. Vol. XI, p. 2105.]

Conclusion.

As was pointed out in the original Petition for Writ of Certiorari, petitioner herein appeared *pro se* throughout a complicated tax proceeding. His reasons were unusual: that the cost of an attorney was prohibitive and he thought he was innocent.[5] Assuming without admitting that this was a valid waiver of counsel, it is respectfully submitted that the lack of counsel did not give a license to the government to run roughshod over petitioner's constitutional right to a fair trial.

Each and every error submitted to the Court on this Petition for Rehearing and in the Petition for Writ of Certiorari constitutes in itself a reversible error. To discuss the evidence of the case and the fact that the entire conviction was sustained upon opinion evidence of government "experts" is redundant.

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[5]When the defendant was arguing to the jury [Vol. XI, pp. 1982-1983], he argued, though erroneously, that he would have to pay attorneys a retainer of $25,000.00, and that the total fee would cost as much as one-half million dollars, and that he would have to earn approximately $3,000,000.00 to pay attorneys in this suit. Although, to most persons, $500,000.00 might seem a large sum to pay for attorney's fees, the Court was unsympathetic.

"Now that is just too bad. Attorneys generally charge fees." [P. 1983, lines 4-5.]

Since 1896, when this Court put its stamp of approval on the so-called "Allen charge", the federal courts and the individual justices have disagreed as to its meaning and effect as illustrated by the comment in the American Bar Association Journal as late as January, 1962, the discord and misunderstanding still exists. There is a need for this Court to resolve and settle the conflicts revolving around this important question of law.

Petitioner respectfully requests this Honorable Court review its decision, denying the Petition for Certiorari and to grant the Petition so that petitioner may have due process of law afforded him according to our concept of justice.

Respectfully submitted,

GRUBIC, DRENDEL & BRADLEY
BURTON MARKS,
By BURTON MARKS,
Attorneys for Petitioner.

Certificate of Counsel.

Burton Marks, being one of the counsel for petitioner herein, certifies to this Court that the Petition for Rehearing is presented in good faith and not for the purposes of delay. Counsel further certifies to this Court that the Petition is restricted to the grounds specified in the Petition for Rehearing, to wit, other substantial grounds available to the petitioner which were not previously presented to this Court.

Dated: April 3, 1962.

BURTON MARKS.